

THE SENATE OF  
THE UNITED STATES

---



*Its History and Practice*

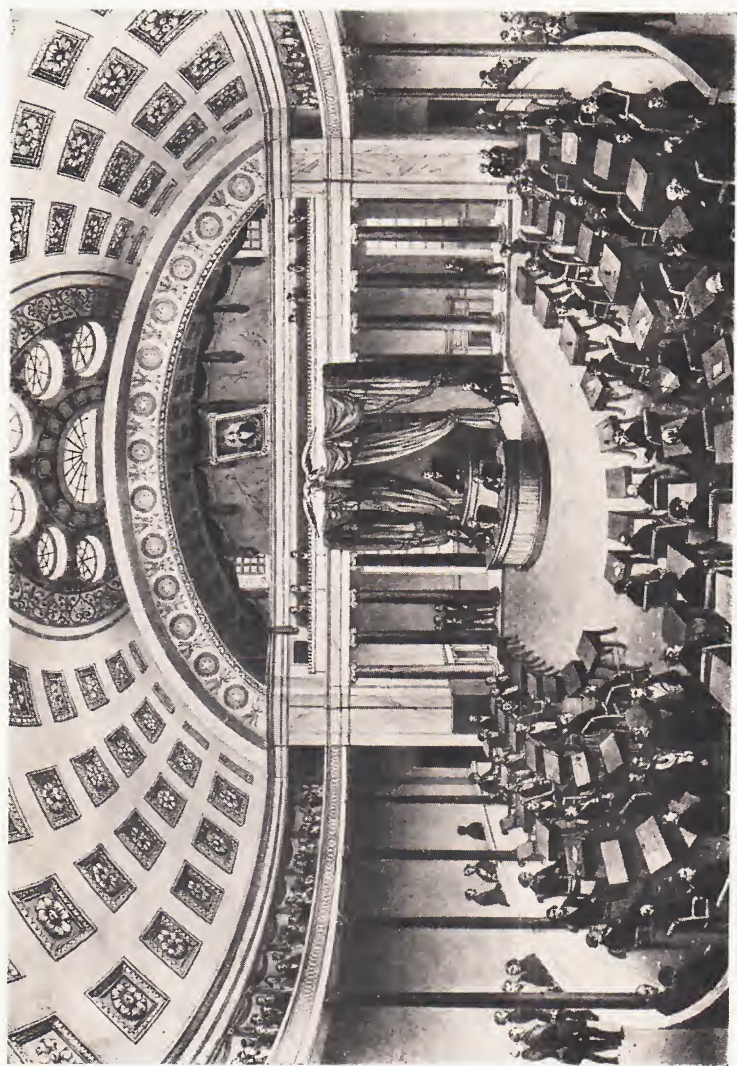
I

CQ LIBRARY  
1414 22nd ST., N.W., 4th FL.  
WASHINGTON, D.C. 20037









THE OLD SENATE CHAMBER, 1809-1859  
Later the Supreme Court Chamber, 1859-1935

GEORGE H. HAYNES

---



# THE SENATE OF THE UNITED STATES

---

*Its History and Practice*

---

The Senate of the United States has been both extravagantly praised and unreasonably disparaged, according to the predisposition and temper of its various critics. . . . The truth is, the Senate is just what the mode of its election and the conditions of public life in this country make it.

WOODROW WILSON (1885)

I

ILLUSTRATED



---

HOUGHTON MIFFLIN COMPANY • BOSTON

*The Riverside Press Cambridge*

1938

COPYRIGHT, 1938, BY GEORGE H. HAYNES

ALL RIGHTS RESERVED INCLUDING THE RIGHT TO REPRODUCE  
THIS BOOK OR PARTS THEREOF IN ANY FORM

*The Riverside Press*  
CAMBRIDGE • MASSACHUSETTS  
PRINTED IN THE U.S.A.

TO

ANNIE BLISS HAYNES

In grateful appreciation of her encouragement and unselfish co-operation in the years we have been living in

*The Senate of the United States*





## PREFACE

---

Two generations ago, Gladstone called the Senate of the United States 'that remarkable body, the most remarkable of all the inventions of modern politics.' Why? Would statesmen or publicists so characterize the Senate today? Again, why? Or, why not?

To the Senate there have been accorded functions more varied in character and — with a single exception — power greater in scope than those of a representative body in any other country. Alone among 'second chambers' in national legislatures the American Senate has won and maintained dominance. Yet it may be questioned whether this pre-eminence is not due more to the exercise of its unique non-legislative powers than to its part in law-making.

The mass of published analysis, comment, and criticism of the Senate has reached enormous proportions, but the bibliography of the Senate is peculiar in this respect: While there have been brought out not a few notable books, and many discerning and informative studies of the Senate by Senators, or by eminent scholars in the field of government and politics, these have concerned themselves mainly with only a few topics of especially timely interest, or that were particularly congenial to the individual writer. No book has appeared that has dealt with the Senate with the comprehensiveness that has been accorded to the Presidency, the Supreme Court, or the House of Representatives. Nearly fifty years ago in a doctoral dissertation Miss Clara H. Kerr presented a brief but well-planned and comprehensive survey, *The Origin and Development of the United States Senate*. Every other writer upon the Senate has been content to leave many and large sections of the field entirely untilled. The reason for this wide gap among the treatises on the American system of government is obvious. Each of the other great branches of our governmental organization has a certain unity of scope. But the Senate's tremendous powers are not merely legislative, but executive, judicial, and investigative as well. To organize such diverse material in a co-ordinated survey cannot fail to be a task forbidding in prospect and difficult in process.



In this book it has been my purpose to deal with Senate history and practice in such wise that the reader — from whatever angle of interest he approaches the Senate — may find here the ‘leads’ to authoritative information upon that particular phase of the subject, set forth in the degree of fullness that can be accorded to it in a balanced study of the Senate.

The first two chapters present in chronological sequence the planning of the Senate in the Federal Convention and the varied precedent-making accomplished by the Senate in the First Congress. The later chapters deal with topics too diverse to be merged in a chronological history of the Senate. Abundant cross-references indicate trends in Senate history, and the relations between lines of functional evolution.

The main facts as to Senate development and usages might be tersely set forth in the summary fashion of a digest of parliamentary law and precedents. But in working upon this book I have been thinking of the Senate, not as a mere wheel in an elaborate governmental machine, but as a group of individual personalities, intent upon an intricate and ever-changing task. I have been keenly interested in the changing personnel of the Senate, and in the shifting of control, economic and geographic, from one section to another. It is for this reason that, by direct quotation in the more dramatic controversies, I have often brought before the reader not a paraphrased digest of decisions, but the actors — Presidents, Representatives, or Senators — so that he may feel the tenseness of the contest.

If a study of the Senate is to be comprehensive and at all realistic, it must take into account not simply arguments advanced and decisions made. It is pertinent, also, to try to get glimpses of the physical setting of the debates — the small room where a score of Senators deliberated behind closed doors as compared with the present huge Chamber with its great galleries for the public and for the press; to watch the changing costumes as well as customs of the debaters; and to note the living and working conditions and even the habits in diet and recreation of the Senators of long ago. Nor must attention be scantied upon the real as well as upon the law-prescribed processes by which Senators are selected and their individual sense of responsibility determined. Is it true that the Senate, ‘now awed by a veterans’ bloc, a farmers’ bloc, and a labor bloc, faces a growing old-age bloc, potentially the most powerful’?

It chances that this book is to come from the press in the recess



following the adjournment of the Seventy-Fifth Congress. A century and a half have passed since Senate history began. Just a quarter of a century has passed since the ratification of the Seventeenth Amendment brought into effect the election of Senators by direct vote of the people. For the future, it may be that this recess between Congresses marks an even more significant milestone. At the election of November 8, 1938, a few weeks hence, no voter will cast a ballot for Senator without knowing clearly which candidate in his state wears the President's badge of approval and which candidate has been adjudged by the President as lacking the proper qualifications for service in the Senate. If such a nation-wide appraisal of Senators becomes accepted as a regular feature of the nominating procedure, the establishment of that precedent may be of far greater moment than that of the Constitutional Amendment that shifted the election of Senators from state legislatures to the voters at the polls.

The following pages will testify that in making these studies of Senate history and practice I have been greatly helped by many Senators of the past and present who have responded frankly and generously to my inquiries. Among Members of the House none has been more helpful than the Honorable Robert Luce, most erudite of American students of 'The Science of Legislation.' Judge William R. Green, during three Congresses chairman of the Committee on Ways and Means, has read critically the chapter on 'The Senate's Influence upon Financial Legislation' and my neighbor and friend, the Honorable George R. Stobbs, has rendered a like service in comments upon the chapter on 'The High Court of Impeachment.' The interest and accuracy of the account of Senate Chambers have been greatly enhanced by the criticisms and suggestions of Mr. David Linn, Architect of the Capitol, who also has made available the photographs for use in this book. With a multitude of other students, I join in grateful appreciation of the courtesy and efficiency with which Dr. Herbert Putnam, Librarian of Congress, has made the vast resources of the Library of Congress easy and delightful of access to the researcher. The interest and encouragement in these studies shown by the late Dr. J. Franklin Jameson will always be a prized memory. Mr. Martin A. Roberts, Chief Assistant Librarian, has been tireless in his helpfulness and Dr. William A. Slade has been interested to trace out many an elusive item. To Director Clarence S. Brigham, Librarian Robert M. G. Vail, and Mrs. Henry A. Reynolds of the American Antiqua-

rian Society Library, and to Librarian Robert K. Shaw and his obliging assistants of the Worcester Free Public Library, I am indebted for many courtesies. Years ago, Professor W. W. Willoughby and Professor Albert Bushnell Hart read major portions of my manuscript and made very valuable suggestions as to its scope and method. Dr. Charles C. Tansill's wide knowledge of source material and keen analysis of many Senate problems have been of great assistance. In the final stages of the preparation of the manuscript Dr. W. F. Willoughby's co-operation has been most generous.

The friends who have so generously helped me by their counsel are not responsible for such mistakes in fact or in opinion as may be found in these Senate studies. Such errors I must claim as my own.

G. H. H.

WORCESTER POLYTECHNIC INSTITUTE  
*October, 1938*



## CONTENTS

---

CHAPTER	PAGE
I. PLANNING THE SENATE IN THE FEDERAL CONVENTION	1
II. SETTING SENATE PRECEDENTS IN THE FIRST CONGRESS	39
III. ELECTION OF SENATORS BY STATE LEGISLATURES	(79)
IV. SENATE CONTROL OVER ELECTIONS AND MEMBERS	119
V. SENATE OFFICERS AND ORGANIZATION	201
VI. SENATE COMMITTEES	269
VII. SENATE RULES AND PROCEDURE	337
VIII. DEBATE IN THE SENATE	381
IX. SENATE INFLUENCE IN FINANCIAL LEGISLATION	429
X. LEADERSHIP AND LOBBYING	471
XI. SENATE INVESTIGATIONS	507





## ILLUSTRATIONS

---

THE OLD SENATE CHAMBER, 1809-1859  
Courtesy of the Library of Congress

*Frontispiece*

THE MARBLE ROOM IN THE SENATE WING  
Courtesy of the Library of Congress

264



# I

---

## PLANNING THE SENATE IN THE FEDERAL CONVENTION

---

---

★

The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.

JAMES MADISON

There is a tradition that on his return from France Jefferson called Washington to account at the breakfast table for having agreed to a second chamber. 'Why,' asked Washington, 'did you pour that coffee into the saucer?' 'To cool it,' quoth Jefferson. 'Even so,' said Washington, 'we pour legislation into the senatorial saucer to cool it.'

MONCURE D. CONWAY

The general object was to provide a cure for the evils under which the United States laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought against this tendency of our Governments; and that a good Senate seemed most likely to answer this purpose.

EDMUND RANDOLPH

It is a maxim that 'the least numerous body is the fittest for deliberation; the most numerous, for decision.'

JAMES WILSON

---

★



# I

---

## PLANNING THE SENATE IN THE FEDERAL CONVENTION

---

THE members of the Federal Convention had to face stern facts. Whatever theories of government the individual delegate might hold, he knew that, unless the men then gathered with him in Independence Hall could work out a plan for a stronger national government which the states would accept, chaos was at the door; 'The United States' would become a mockery, unable to command respect abroad or even to preserve order at home. Every state had its Shays.

The crux was the form and the powers to be assigned to the legislature. There was no model for the lawmaking body of a federal state, already great and capable of unlimited growth. To many the very conception of a federal state as contrasted with a federation was repugnant. American Congresses of the previous decade had not solved the problem; they furnished little but warnings. The Continental Congress had assumed and exercised the sovereign powers which revolution and war made necessary; but no sooner had that necessity relaxed than the Congress suffered a lamentable decline both in personnel and in influence. When that purely revolutionary body was replaced by a constitutional Congress under the Articles of Confederation, brief experience sufficed to prove that domestic order and freedom from foreign aggression could be secured only by placing control in the hands of a legislature more genuinely representative and possessed of greatly extended powers, for the Articles of Confederation had proved to be 'a rope of sand.'

Most of the delegates to the Federal Convention came to their new task from experience that could not fail to prove of great value. Many of them had served in those earlier Congresses, and during the previous ten years had taken part in constitution-making in their several states. The successes and the failures of the colonial assem-

blies and of the new state legislatures were fresh in their minds. To these men of English stock inevitably the model which most invited study was the British Parliament. References to it were frequent; but even those who, like Charles Pinckney, believed the Constitution of Great Britain to be the best in existence, recognized that the United States contained 'but one order that can be assimilated to the "British Nation," — this is the order of Commons. . . . We must . . . suit our Government to the people it is to direct.' <sup>1</sup>

---

## THE STRUCTURE AND PLAN OF THE SENATE

---

### THE UPPER BRANCH IN A BICAMERAL LEGISLATURE

Both the Randolph and the Pinckney Plans, laid before the Convention on the first day after it had adopted rules for its proceedings, provided for a legislature of two branches.<sup>2</sup> Two days later in Committee of the Whole Madison recorded that 'the 3rd Resolution "that the national Legislature ought to consist of two branches" was agreed to without debate or dissent, except that of Pennsylvania, given probably from complaisance to Doctor Franklin, who was understood to be partial to a single House of Legislation.'<sup>3</sup> June 21 this resolution was agreed to in Convention.

<sup>1</sup> Where no other citation is made, references to the proceedings of the Federal Convention are to 'The Debates in the Federal Convention of 1787. Reported by James Madison.' Published, 1920, by the Carnegie Endowment for International Peace. For this title this abridged form will be used: Madison, *Debates*, 156-61. James Wilson, the most democratic member of the Convention, insisted: 'The British Government cannot be our model. We have no materials for a similar one. Our manners, our laws, the abolition of entails and of primogeniture, the whole genius of the people are opposed to it.' *Ibid.*, 72.

<sup>2</sup> May 29, 1787. Randolph: '3. Res. — that the National Legislature ought to consist of two branches.' (Madison, *Debates*, 24.) Pinckney: '4. Two branches of the Legislature — Senate — House of Delegates, — together the United States in Congress assembled.' (*Ibid.*, 597.) See editor's note as to the form and substance of 'The Pinckney Plan.'

Not only the Continental Congresses and the Congress of the Confederation had been unicameral, but three state constitutions framed before 1787 had provided for legislatures of but one branch: Pennsylvania, 1776 (F. N. Thorpe, *American Charters*, 3084), Georgia, 1777 (*ibid.*, 778-79), and Vermont, 1777 and 1786 (*ibid.*, 3742; 3754).

<sup>3</sup> Dr. Franklin presided over the Pennsylvania Constitutional Convention of 1776, and is said to have carried the measure in favor of a single chamber by a speech in

On the same day debate was begun upon the proposal 'that the second branch of the National Legislature ought to be chosen by the first branch out of persons nominated by the State Legislatures.' This proposal was defeated by a vote of 7 to 3. 'So,' said Madison, 'the clause was disagreed to and a chasm left in this part of the plan.'<sup>1</sup>

#### THE BASIS OF REPRESENTATION

The bridging of that chasm proved one of the most difficult engineering feats in the whole history of the Convention. For what was really involved was the scheme of representation in the new legislature. On this question for more than a fortnight the Convention was 'on the verge of dissolution, scarce held together by the strength of a hair, though the public papers were announcing our complete unanimity.'<sup>2</sup> It was at this critical stage, after the delegates for more than a month had been 'groping as it were in the dark to find political truth,' that Franklin surprised his colleagues by moving that the daily sessions be opened by prayer.<sup>3</sup>

At the very first session of the Convention, when the delegates presented their credentials, it had been noted that the members from

which he said: 'Two assemblies appeared to him like a practice he had somewhere seen, of certain wagoners, who, when about to descend a steep hill with a heavy load, if they had four cattle, took off one pair from before, and chaining them to the hinder part of the wagon drove them up the hill; while the pair before and the weight of the load, overbalancing the strength of those behind, drew them slowly and moderately down the hill.' Quoted by John Adams, 'A Defence of the Constitutions of Government of the United States of America,' in *Writings* (1851 ed.), IV, 390. Franklin's views on unicameral legislatures are more positively expressed in his *Works* (Sparks ed.), I, 409; V, 165; X, 361.

This recalls Sieyès's well-known epigram: 'If a Second Chamber dissents from the First, it is mischievous; if it agrees, it is superfluous'; on which Sir Henry Sumner Maine commented: 'If the decisions of the community, conveyed through one particular organ, are not only imperative but all-wise, a Second Chamber is a superfluity or an impertinence.' (*Popular Government*, 178.) For an academic presentation of the advantages of the bicameral legislature in general and for the United States in particular, see Noah Webster's 'An Examination into the Leading Principles of the Constitution,' in P. L. Ford's *Pamphlets on the Constitution of the United States*, 31-36.

<sup>1</sup> Madison, *Debates*, 35, May 31. In Committee of the Whole. The three states then voting in favor of the proposal were Massachusetts, Virginia, and South Carolina.

<sup>2</sup> Luther Martin, to the Maryland legislature, *The Genuine Information — Secret Proceedings of the Convention*, 35. Elliot, *Debates* (1836), I, 358.

<sup>3</sup> June 28. Madison, *Debates*, 182. An adjournment was carried, without any vote on this motion, Hamilton and others expressing the apprehension that at this late day such a resolution might bring on the Convention some disagreeable animadversions and lead the public to believe that the embarrassments and dissensions within the Convention had suggested this measure. Franklin answered, 'that the alarm out of doors that might be excited for the state of things within, would at least be as likely to do good as ill.'



Delaware 'were prohibited from changing the article in the Confederation . . . which declared that "in determining Questions in the United States in Congress Assembled, each State shall have one Vote."' <sup>1</sup> Delegates from the small states declared that 'no modification whatever could reconcile the Smaller States to the least diminution of their equal Sovereignty.' <sup>2</sup>

After weeks of anxious debate it was voted 'that the rule of suffrage in the 1st branch ought not to be according to that established in the Articles of Confederation.' <sup>3</sup> In other words, the delegates from the large states succeeded in defeating equal representation in the lower branch. Forthwith Ellsworth moved that 'the rule of suffrage in the 2d branch be the same with that established by the articles of confederation.' In supporting this motion he declared that he was

not sorry on the whole that the vote just passed, had determined against this rule in the first branch. He hoped it would become a ground of compromise with regard to the 2d branch. We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States against the small. An equality of voices was conformable to the federal principle and was necessary to secure the small states against the large. He trusted that on this middle ground a compromise would take place. He did not see that it could on any other. And if no compromise should take place, our meeting would not only be in vain but worse than in vain. To the Eastward he was sure Massachusetts was the only state that would listen to a proposition for excluding the States as equal political Societies, from an equal voice in both branches. The others would risk every consequence rather than part with so dear a right. An attempt to deprive them of it, was at once cutting the body of America in two, and as he supposed would be the case, somewhere about this part of it.

#### THE 'GREAT COMPROMISE'

This conciliatory proposal formed the basis of the most important compromise in the whole history of the Convention, but its acceptance was not easily attained. The next morning the New Jersey delegates at once tried to secure the adoption of a motion that the President of the Convention write to the Executive of New Hampshire, informing him 'that the business depending before the Convention was of

<sup>1</sup> Madison, *Debates*, 18. Articles of Confederation, art. V, cl. 4.

<sup>2</sup> *Ibid.*, 201. Dickinson said to Madison: 'We [the delegates from the small states] would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage in both branches of the legislature, and thereby be thrown under the domination of the large states.' *Ibid.*, 101, n.

<sup>3</sup> *Ibid.*, 188. Connecticut, New York, New Jersey, and Delaware voted against it.

such a nature as to require the immediate attendance of the deputies of that State' — it being well understood that the object was to gain another small state's opposition to proportional representation. Question was raised whether the sending of such a message would be consistent with the rule or reason of secrecy. Delegates doubted the propriety of soliciting any state on the subject and believed that the sending of the message would spread a great alarm.<sup>1</sup> The motion was promptly defeated. There followed a day of animated debate upon Ellsworth's motion. Wilson at once opposed it. 'Can we forget for whom we are forming the Government? Is it for *men*, or for the imaginary beings called *States*?'<sup>2</sup> He ridiculed the idea that there would be oppression with popular suffrage, but feared minority rule when one third of the population in seven states might dominate two thirds in six states.<sup>3</sup>

Ellsworth insisted that this fear of minority rule was groundless. Protesting that his remarks were not the result of partial or local views, since the state he represented (Connecticut) 'held a middle rank,' he appealed to the

obligations of the federal pact which were still in force, and which had been entered into with so much solemnity; persuading himself that some regard would still be paid to the plighted faith under which each State small as well as great, held an equal right of suffrage in the general Councils.<sup>4</sup>

Madison acknowledged that where there was a danger of attack there ought to be given a constitutional power of defense. But he insisted that the states were divided into different interests, not by their difference in size, but by other circumstances, the most material of which resulted from climate, but principally from the effect of their having or not having slaves. He had considered suggesting that representation in one branch should be computed according to the number of free inhabitants only and in the other according to the whole number, counting the slaves as if free.<sup>5</sup>

Many who objected to equal representation recognized clearly that mere proportionality would not yield an ideal solution, for if Delaware were to be accorded one member there would result a body of from eighty to one hundred — too large to handle some of the functions likely to be assigned to it. Accordingly Wilson suggested one member for every 100,000 souls, each state being allowed one

<sup>1</sup> Madison, *Debates*, 189. So Madison noted in his *Journal*.

<sup>2</sup> *Ibid.*, 190.

<sup>3</sup> *Ibid.*, 191-93.

<sup>4</sup> *Ibid.*, 193.

<sup>5</sup> *Ibid.*, 195.

member — a proposal which Madison thought deserved consideration inasmuch as a Senate with equal state votes would be ‘only another edition of Congress.’<sup>1</sup> Franklin suggested that an equal number be assigned to each state, and that in the Senate each state have equal suffrage on questions affecting the sovereignty of the states and appointments of all civil officers of the general Government, but weighted votes as to salaries and appropriations.<sup>2</sup>

When Ellsworth’s motion ‘for allowing each state an equal vote in the second branch’ was brought to a vote at the next session, it was lost by a tie.<sup>3</sup> This deadlock gave rise to tense debate which resulted in the adoption of a proposal that ‘a special committee consisting of one member from each state should be appointed to devise & report some compromise.’ As soon as the balloting ended, it was apparent that in the committee’s personnel the small-state men had won.<sup>4</sup>

Three days later, July 5, the committee presented two recommendations, ‘on the condition that both shall be generally adopted.’ The first in effect provided that in the first branch of the legislature each state should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves; and that all bills for raising or appropriating money and for fixing federal officers’ salaries should originate in the lower branch and not be altered or amended by the second branch; and that no money should be drawn from the Public Treasury but in pursuance of appropriations to be originated in the first branch. Over against these provisions — the importance of which was a matter of most diverse opinion — stood the second recommendation — ‘Resolv<sup>d</sup> that in the 2d branch each State shall have an equal vote.’<sup>5</sup>

For ten days this compromise proposal was under debate. By some its provisions were characterized as the most objectionable of any yet heard.<sup>6</sup> Madison hoped for its rejection, whatever the conse-

<sup>1</sup> Madison, *Debates*, 196, 198.

<sup>2</sup> *Ibid.*, 196–97.

<sup>3</sup> *Ibid.*, 201. The absence of one Maryland delegate gave Martin the opportunity to vote Aye for that state; the Georgia vote was divided, Baldwin, a former Connecticut man, voting Aye.

<sup>4</sup> *Ibid.*, 205.

<sup>5</sup> *Ibid.*, 206. Madison notes that Ellsworth could not serve upon the committee because of illness, and was replaced by Sherman. ‘This report was founded on a motion in the Committee made by Dr. Franklin. It was barely acquiesced in by the members from the States opposed to an equality of votes in the 2d branch and was evidently considered by the members on the other side, as a gaining of their point.’ See Elliot, *Debates*, I, 356–57.

<sup>6</sup> Madison, *Debates*, 211.



quences.<sup>1</sup> Excited debaters suggested that it might be necessary to annex Delaware to Pennsylvania and divide New Jersey between New York and Pennsylvania to avoid domination by the small states, and declared that if persuasion should not unite the country upon a reasonable and just basis, the sword would do so.<sup>2</sup> But in considering the different features of the compromise one by one, the delegates came into a more conciliatory mood — possibly helped thereto, as Farrand suggests, by the fact that the weather, which had been extremely hot, suddenly turned cool.<sup>3</sup> They came to an agreement upon a tentative distribution of sixty-five members of the first branch among the several states to be reapportioned after periodic censuses. A suggestion by Gouverneur Morris, as to the desirability that wealth receive some recognition, led to the acceptance of the provision that direct taxes should be in proportion to representation.<sup>4</sup> On the morning of July 16 the whole compromise, as amended, was adopted.<sup>5</sup>

Thus did the principle of equal representation of the states in the Senate find its way into the Constitution, the structure of Congress being 'finally determined by the votes of less than a majority of the states present in the Convention, and of less than one-third of the represented population.'<sup>6</sup> This principle was doubly 'clinched' when, on the day previous to that of the Convention's final adjournment, Gouverneur Morris moved to annex the further proviso, 'that no state, without its consent, shall be deprived of its equal suffrage in the Senate.' Madison noted: 'This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no.'<sup>7</sup>

<sup>1</sup> Madison, *Debates*, 207. 'It was vain to purchase concord in the Convention on terms which would perpetuate discord among their Constituents.'

<sup>2</sup> *Ibid.*, 210. Gouverneur Morris said that the report 'made the 2d branch another Congress, a mere whisp of straw.' *Ibid.*, 221. Wilson maintained that 'equality in the 2d branch, . . . being a fundamental and a perpetual error, it ought by all means to be avoided.'

<sup>3</sup> Max Farrand, *The Framing of the Constitution*, 104. The account of the 'Great Compromise' is given in great detail, 91-112.

<sup>4</sup> Madison, *Debates*, 241-42.

<sup>5</sup> *Ibid.*, 259. Five states (Connecticut, New Jersey, Delaware, Maryland, North Carolina) voting Aye; four states (Pennsylvania, Virginia, South Carolina, Georgia) voting No, while Massachusetts' four votes were equally divided.

<sup>6</sup> Roger Foster, *Commentaries on the Constitution of the United States*, 314.

Madison, *Debates*, 263, gives an account of an excited conference the next morning, before the opening of the session, in which delegates from the larger states discussed the policy of risking failure of any general act of the Convention by inflexibly opposing this equal representation in the upper branch.

<sup>7</sup> *Ibid.*, 575.

## TWO SENATORS FROM EACH STATE, TO VOTE PER CAPITA

There still remained the questions, how large the equal state delegations should be, and how the members should vote. Gouverneur Morris favored state delegations of three, for he wanted the Senate to be a pretty numerous body, and thought that if they consisted of but two and a quorum were a majority, the power would be lodged in fourteen, too small a number for such a trust.<sup>1</sup> Others were of the opinion that the expense of sending and supporting three Senators would prove a burden for the more remote states. Believing that more states would be admitted and large states divided, some favored allotting two Senators to each state, on the ground that a small number would be most convenient for deciding on peace and war and other momentous issues likely to be devolved upon the Senate. Although Martin opposed the Senators' voting as individuals as a departure from the idea of states being represented in that body, it was finally agreed, Maryland alone dissenting, that the second branch should consist of two members from each state who should vote per capita.<sup>2</sup>

---

SENATORS TO BE ELECTED BY STATE LEGISLATURES

---

How should members of the second branch be elected? No other provision of the Constitution relating to the structure of the Government has given rise to so much controversy as has the decision which the Convention gave to this question. After a century and a quarter of experience which became increasingly more unsatisfactory, by the Seventeenth Amendment the method was changed — whether with the result of elevating the standard in the Senate 'is still an open question.'<sup>3</sup> In the Federal Convention itself this question did not assume major proportions. Although the discussion was keen and covered a wide range, the debate upon this specific issue was mostly confined to three days.<sup>4</sup>

<sup>1</sup> Madison, *Debates*, 310.

<sup>2</sup> *Ibid.*, 310. July 23; final vote, Aug. 9 (366).

<sup>3</sup> So said Senator Fess, in debate in the Senate, March 15, 1924. Quoted in 'The Senate: New Style,' George H. Haynes, *Atlantic Monthly*, Aug., 1924, 257.

<sup>4</sup> May 31. June 7 and 12.



Five methods received consideration:<sup>1</sup>

*Appointment by the Executive*

Some urged appointment by the Executive, his choice to be made from the proper number of persons nominated by state legislatures. Gerry characterized this proposal as 'a stride toward monarchy that few will think of.'<sup>2</sup>

*Popular Election*

At the other extreme, direct election of Senators by the people found its sole but earnest advocate in James Wilson, who insisted that the Senate should be made independent both of the lower branch of Congress and of the state legislatures. But popular election met with strong opposition. Sherman declared, 'The people should have as little to do as may be about the Government. They lack information and are constantly liable to be misled.' Gerry, too, asserted that the evils they experienced flowed from the excess of democracy, and that 'to draw both branches of the legislature from the people would leave no security to the latter [the commercial] interest; the people being chiefly composed of the landed interest, and erroneously supposing the other interests are adverse to it.'<sup>3</sup> Delegates from both Massachusetts and South Carolina declared that in their respective states the majority of the voters were in favor of paper money as a legal tender, while the legislatures were opposed to it; and both observers attributed this difference to the fact that the legislatures had 'more sense of character and would be restrained by that from injustice.'<sup>4</sup> In a test vote which involved approval of popular election, Pennsylvania alone voted in its favor.<sup>5</sup> Madison seems to have voiced the prevailing opinion when he declared himself 'an advocate for the policy of refining the popular appointment by successive filtrations' — a process which he thought especially applicable to the appointment of the second branch of the legislature.<sup>6</sup>

<sup>1</sup> The Convention's debate and action upon this subject are discussed more in detail in the first chapter of *The Election of Senators*, George H. Haynes. Madison, *Debates*, 71-73.

<sup>2</sup> Declaring that the object of the Senate was to 'check the precipitation, changeableness, and excesses of the first branch,' Gouverneur Morris insisted: 'The Executive should appoint the Senate and fill up vacancies.... The members being independent and for life, may be taken as well from one place as from another.' *Ibid.*, 203.

<sup>3</sup> *Ibid.*, 71.

<sup>4</sup> *Ibid.*, 66; 73. Gerry and Pinckney.

<sup>5</sup> *Ibid.*, 74.

<sup>6</sup> *Ibid.*, 33. In Senate debate on the proposed Seventeenth Amendment Beveridge and W. L. Jones entirely misrepresented Madison's attitude (p. 109, n. 1).

*By Special Electors*

Hamilton proposed that at the start the Senate should consist of forty members (to serve during good behavior and to be removed only by impeachment), who should be chosen from single-member districts, each state being assured of at least one Senator; that 'upon each election (in a given district), there shall be not less than six nor more than twelve Electors chosen' for that purpose by citizens who were large landed proprietors.<sup>1</sup>

*By Members of the House of Representatives*

That the members of the second branch should be chosen by the members of the first branch — a feature of both the Randolph and Pinckney plans — commanded hardly any support, Gerry expressing the general opinion when he said that it would create a dependence contrary to the end proposed.<sup>2</sup>

*By State Legislatures*

The election of Senators by state legislatures seems to have been generally regarded as corollary of the Great Compromise of July 16, which granted to each state 'an equal vote in the second branch.' Says Farrand: 'All statements of members (as to method of election) prior to that date must be interpreted in the light of the question at issue, which was not one of election by the people or election by state legislatures — it was solely a question of equal or proportional representation.'<sup>3</sup>

Outspoken opposition to that method came from but one man, James Wilson, the sole advocate of direct election by the people. He insisted that if the Senate should be chosen by the legislatures and the House by the people, the two would rest on different foundations, and dissensions would arise between them. He held that the power to elect Senators would increase the weight of the legislatures, and tend to incite interference between the general and the local

<sup>1</sup> Madison, *Debates*, 609. Art. III, sec. 1, of Hamilton's 'Draft of a Constitution for the United States.' This proposal did not come under debate in the Convention, but it is of interest as showing what was Hamilton's individual preference. Doubtless to most of the delegates this method seemed likely to produce a too slowly changing and conservative Senate. They may have thought it needlessly complicated. Why elect a special set of electors? Could not the choice of Senators be as well made by some other body of men already selected — for example, by the House of Representatives, or by the state legislatures?

<sup>2</sup> *Ibid.*, 71.

<sup>3</sup> Max Farrand, 'Popular Election of Senators,' *Yale Review* (Jan., 1913), 234-41; *The Framing of the Constitution*, 111-12.

governments, for he declared that experience showed that the states' opposition to Federal measures had proceeded much more from the state officers than from the people.<sup>1</sup>

It is significant that this sole critic of legislative elections emphasized defects which experience proved to be largely imaginary, while he failed to anticipate a single one of the abuses which led in 1913 to the abandonment of legislative elections.

On the other hand, hardly any other proposition before the Convention brought forward so many members to testify to their belief in its merits. The arguments followed four main lines: (1) In the first place, it was insisted that by 'filtration' through the legislatures — they having, as was asserted, 'more sense of character' than the people at large — there would be secured a refinement in the choice resulting in a higher grade of Senators. (2) In the second place, it was held that the legislative election would give a more complete, a more effective representation, the sense of the states being better collected through their governments than immediately from the people at large. (3) Turning the defect mentioned by Wilson into a merit, Pinckney urged that because of the different modes of representation in the House and the Senate each branch would form a proper and independent check upon the other, and the legislative power would be advantageously balanced.<sup>2</sup> (4) Far from inciting interference, Sherman insisted that through their choice of Senators the individual state legislatures would become interested to support the National Government, and that thus a due harmony between the two governments would be maintained.<sup>3</sup>

Despite the fact that the provision of the Constitution as to the election of Senators is one of the very few which have been formally annulled by amendment, there is abundant justification for the *Federalist's* statement that in 1787 it was probably 'the most congenial with public opinion.' With rare exceptions, to the progressive thinkers of that period for the filling of important offices no agency seemed more normal, as no agency was more prevalent, than election by state legislatures. It was from current practice, almost as a matter of course, that the framers of the Constitution gave this method their approval. By their legislatures the thirteen colonies made protest against British oppression and prepared to make common resistance.

<sup>1</sup> Madison, *Debates*, 33-34; 70; 73-74.

<sup>2</sup> In defending the Constitution before the South Carolina Convention. Elliot, *Debates*, IV, 257.

<sup>3</sup> Madison, *Debates*, 69.



Throughout the war it had been the state legislatures which elected the governors and most of the other officers, both civil and military. It was by these legislatures that the members of the Continental Congress and the delegates to the Congress of Confederation were elected. Under the state constitutions which had been framed before 1787 the New England states and New York were the only ones in the election of whose governors the legislature did not have a part. In the great majority of the states the judges were elected by the legislatures. Finally, the delegates to this very Convention had themselves all been elected by the legislatures of their several states. It would have been self-stultification, indeed, had the members of the Federal Convention assented to the proposition that the choice of a Senate by state legislatures could not give a worthy representation of the people.<sup>1</sup>

### SENATORS' QUALIFICATIONS AND PAY

At the second day's session of the discussion of his plan in Committee of the Whole, Randolph explained that

the general object (of the second branch of the legislature) was to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.<sup>2</sup>

In similar vein Madison declared:

The use of the Senate is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch.<sup>3</sup>

Such objects obviously would be attained not only, as the delegates believed, by the filtration provided by legislative election, but also

<sup>1</sup> In the words of Senator Turpie:

'The state legislatures, during the War for Independence, and for sometime afterward, were the favored and trusted depositories of a variety of delegated powers. It is not strange, therefore, that the part given them in the election of the Senate should have attracted little notice, elicited no dissent.'

<sup>2</sup> Madison, *Debates*, 34.

<sup>3</sup> *Ibid.*, 71.

*Congressional Record*, XXIII, 77.

by laying down special qualifications for Senators and by assigning to the Senate important and distinctive powers.

## AGE

Randolph's Plan prescribed that 'the members of the second branch ought to be . . . of the age of                      years at least.' Without debate the Committee of the Whole promptly agreed to 'filling the blank with thirty years as the qualification.'<sup>1</sup>

## CITIZENSHIP AND RESIDENCE

Without instructions the Committee of Detail inserted in their report the provision that 'every member of the Senate . . . shall have been a citizen of the United States for at least four years before his election.'<sup>2</sup> Gouverneur Morris at once moved to make the citizenship qualification fourteen instead of four years, and Pinckney insisted that,

as the Senate is to have the power of making treaties & managing our foreign affairs, there is peculiar danger and impropriety in opening its door to those who have foreign attachments.

Others approved of a long preliminary citizenship; but Franklin, Randolph, and Madison spoke earnestly against so restricted a provision in the Constitution. Madison characterized it as unnecessary, because the national legislature, through its power over naturalization, could fix different periods of residence as conditions of enjoying different privileges of citizenship; and improper, because it would give a tincture of illiberality to the Constitution, and discourage the most desirable class of people from emigrating to the United States.<sup>3</sup> James Wilson, himself not a native of the United States, emphasized the chagrin which such a provision would produce.

To be appointed to a place may be matter of indifference. To be incapable of being appointed, is a circumstance grating and mortifying.

Votes were taken on proposals of fourteen, thirteen, and ten years. Finally an agreement was reached upon nine years as the period of

<sup>1</sup> Madison, *Debates*, 94.

<sup>2</sup> *Ibid.*, 339.

<sup>3</sup> *Ibid.*, 367-70, for debate on the citizenship qualification. Williamson made the discerning observation:

It is more necessary to guard the Senate in this case than the other House. Bribery and cabal can be more easily practiced in the choice of the Senate which is to be made by the Legislatures composed of a few men, than of the House of Representatives who will be chosen by the people.

preliminary citizenship. No objection was raised to the requirement that at the time of election the Senator should 'be an inhabitant of that State for which he shall be chosen.'

#### TERM

The Senator's term of office was a matter of great difference of opinion. In Randolph's Plan members of the Senate were 'to hold their offices for a term sufficient to insure their independency.'<sup>1</sup> In advocating a term of seven years Randolph said:

The democratic licentiousness of the State Legislatures proved the necessity of a firm Senate. The object of this 2<sup>d</sup> branch is to control the democratic branch of the Nat<sup>l</sup> Legislature. If it be not a firm body, the other branch being more numerous, and coming immediately from the people, will overwhelm it.<sup>2</sup>

Delegates who thought seven years too long a term suggested five and three years. Hamilton, on the other hand, believed that the Senators — and the Executive, also — should

hold their places for life or at least during good behavior. . . . On this plan we should have in the Senate a permanent will, a weighty interest, which would answer essential purposes.<sup>3</sup>

Gouverneur Morris put forward a more cynically practical argument:

It should be considered too how the scheme could be carried through the States. He hoped there was strength of mind eno' in this House to look truth in the face. He did not hesitate therefore to say that loaves & fishes must bribe the Demagogues. They must be made to expect higher offices under the general than the State Gov<sup>ts</sup>. A Senate for life will be a noble bait. Without such captivating prospects, the popular leaders will oppose & defeat the plan.<sup>4</sup>

Though preferring tenure during good behavior, a delegate moved that the term be nine years, the longest which he believed could be obtained. Wilson supported this motion, arguing that with rotation it would provide the desirable stability and efficacy.<sup>5</sup> Only after discussion of many other proposals was agreement reached that Senators should serve for six years, one third going out biennially.

#### SENATORS' COMPENSATION

Randolph's Plan had provided that members of each branch of Congress 'receive liberal stipends, by which they may be compensated for the devotion of their time to public service.'<sup>6</sup>

<sup>1</sup> Madison, *Debates*, 24.

<sup>2</sup> *Ibid.*, 95.

<sup>3</sup> *Ibid.*, 117.

<sup>4</sup> *Ibid.*, 203.

<sup>5</sup> *Ibid.*, 171.

<sup>6</sup> *Ibid.*, 24.

Early in the discussion of this clause it was proposed that the members should receive no salary or compensation for their services, the intent being, as Madison inferred, that the members should be paid by their respective states.<sup>1</sup> This proposal was defeated by vote of 7 to 3. Franklin objected to the phrase 'liberal stipends' and the word 'liberal' was struck out.<sup>2</sup> Madison then urged that the compensation be designated as 'fixt.'

To leave them to regulate their own wages was an indecent thing, and might in time prove a dangerous one. He thought wheat or some other article of which the average price throughout a reasonable period preceding might be settled in some convenient mode, would form a proper standard.<sup>3</sup>

Although some delegates thought Senators' pay should be higher than that of members of the lower branch because of the likelihood that the Senate would be more continuously in session, it was finally agreed that the same rule should apply to members of both branches.

#### *By Whom Should the Compensation be Paid?*

There was much discussion whether the salaries should be paid by the National Government or by the individual states. Madison insisted that 'it would be improper to leave the members of the National Legislature to be provided for by State Legislatures because it would create an improper dependence.'<sup>4</sup> Others emphasized the fact that it would result in the lack of uniform payment for the same service, and would impose so heavy a burden on remote states that they would make payments too small to secure the needed grade of service.

From the Committee of the Whole the provision as to compensation was reported to the Convention as follows:

to receive fixed Stipends by which they may be compensated for the devotion of their time to public service, to be paid out of the National Treasury.

When this clause was brought up for consideration, General Pinckney renewed the proposal that 'no salary should be allowed.' He insisted that

as this (the Senatorial) branch was meant to represent the wealth of the Country, it ought to be composed of persons of wealth; and if no allowance was to be made the wealthy alone would undertake the service.<sup>5</sup>

<sup>1</sup> Madison, *Debates*, 96.

<sup>2</sup> *Ibid.*, 93; 171.

<sup>3</sup> *Ibid.*, 92.

<sup>4</sup> *Ibid.*, 172.

<sup>5</sup> *Ibid.*, 171.



Franklin seconded his motion saying: 'If lucrative appointments should be recommended we might be chargeable with having carved out places for ourselves.' This motion was defeated by a vote of 5 to 6. All the states but one then voted to change the phrasing so as to read, 'to receive a compensation for the devotion of their time to the public service,' the motive being, as Madison inferred, 'only to get rid of the word "fixt" and leave greater room for modifying the provision on this point.'<sup>1</sup> Again there came a test vote upon a motion that the members be paid by their respective states. It was strongly objected that such payment of the Senators would be fatal to their independence, and by a vote of 5 to 6 the motion was defeated.

As finally adopted the provision stood:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.<sup>2</sup>

#### THE POWERS OF THE SENATE

---

I can assure you as a fact that for more than Four months & a half out of five the power of exclusively making treaties, appointing public Ministers & judges of the Supreme Court was given to the Senate after numerous debates & consideration of the subject both in Committee of the whole & in the house — this I not only aver but can prove by printed Documents in my possession to have been the case.

So wrote Charles Pinckney to John Quincy Adams thirty years after the Federal Convention had finished its labors. He added that in personal conversation he should be glad to tell 'some things relative to this business that may be new and perhaps surprising to you,' and hinted at 'disclosures of secrets acted there.'<sup>3</sup>

Pinckney's implication of stealth and guile need not be taken too seriously, for after the lapse of thirty years his memory — to state the matter generously — seems not to have remained unimpaired.<sup>4</sup>

<sup>1</sup> Madison, *Debates*, 172.

<sup>2</sup> *Ibid.*, 173. See n. 1. Constitution, art. I, sec. 6.

<sup>3</sup> *Ibid.*, 599. See editors' comments, p. 596, n. 1.

<sup>4</sup> *Ibid.*, 600. See editors' comments, n. 1.



But he did bring out here a fact of cardinal importance in the development of the Senate: The whole scheme of the apportionment of powers between the President and the Senate underwent a radical change less than a fortnight before the end of the Convention, in consequence of the fateful decisions, made September 6, as to the method of choosing the Executive.

On the last day of August there were referred to the Committee of Eleven such parts of the Constitution as had been postponed, among others the method of choosing the President, which Wilson declared 'in truth the most difficult of all which we have had to decide.'<sup>1</sup> Election by Congress — much debated, often denounced, once rejected only to be readopted — came before the committee in the form: 'He shall be elected by ballot by the Legislature.' September 4 the committee made its surprising report including the recommendation for the choice of President by electors. Three days' debate ended in the adoption of the novel and artificial process of electing the President. But another cause for anxiety as to Senate domination over the President yet remained. The committee's report provided that, in case of a tie between candidates for the presidency, or in case of a failure of any candidate to secure a majority, the Senate should choose a President from the five highest on the list. In a similar dilemma as to the election of Vice-President, the Senate was to have the decisive vote.<sup>2</sup>

#### THE ULTIMATE ELECTION OF PRESIDENT OF THE UNITED STATES

This 'ultimate' election of President by the Senate caused grave doubts as to the propriety of associating the two in the making of treaties and appointments. One delegate predicted that 'nineteen times in twenty the President will be chosen by the Senate, an improper body for the purpose.'<sup>3</sup> Another declared that 'it threw the whole appointment in fact into the hands of the Senate.'<sup>4</sup> On the other hand, others thought that as time went on 'the Senate would be less and less likely to have the eventual appointment thrown into their hands,' for, said Wilson, 'Continental Characters will multiply as we, more and more coalesce, so as to enable the electors in every part of the Union to know and judge of them.'<sup>5</sup> To the question why

<sup>1</sup> Madison, *Debates*, 510. For excellent summary, Max Farrand, *The Framing of the Constitution*, 160-75; W. M. Meigs, *The Growth of the Constitution*, 198-209.

<sup>2</sup> Madison, *Debates*, 507.

<sup>3</sup> *Ibid.*, 509.

<sup>4</sup> *Ibid.*, 510.

<sup>5</sup> *Ibid.*, 510.

the ultimate choice was assigned, not to the legislature but to the Senate, Gouverneur Morris, for the committee, bluntly replied: 'The Senate was preferred because fewer men could then say to the President, "you owe your appointment to us."' <sup>1</sup> A dozen delegates expressed grave apprehension that the tendency of giving to the Senate such an influence over the election of the President, in addition to its other powers, would be 'to convert that body into a real and dangerous "Aristocracy."' One delegate declared he would 'prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy.' <sup>2</sup>

Mr. Wilson said that . . . he was obliged to consider the whole as having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate. They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. In allowing them thus to make the Executive & Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be laws of the land, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government. The power of making Treaties involves the case of subsidies, and here as an additional evil, foreign influence is to be dreaded. According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate. He had always thought the Senate too numerous a body for making appointments to office. The Senate, will moreover in all probability be in constant Session. They will have high salaries. And with all those powers, and the President in their interest, they will depress the other branch of the Legislature, and aggrandize themselves in proportion. <sup>3</sup>

Despite all this dissent, the vote of seven states carried the decision in favor of referring 'the eventual appointment of the President to the Senate.' <sup>4</sup> But apprehension had not been removed. Almost immediately Sherman suggested that it would be better to give this power, not to the Senate nor to the Legislature, but to the House, and as a substitute for the clause just adopted he moved that the choice be made by the House of Representatives, each state having one vote. This motion, which settled this much-debated question, received the approval of every state but Delaware. <sup>5</sup>

<sup>1</sup> Madison, *Debates*, 511.

<sup>2</sup> *Ibid.*, 518.

<sup>3</sup> *Ibid.*, 519.

<sup>4</sup> *Ibid.*, 523.

<sup>5</sup> *Ibid.*, 523.

## THE SENATE'S PART IN TREATY-MAKING

The very day after this action had allayed the fear that the Senate, through the ultimate election of the President, would be made of overwhelming dominance, the Convention came to its final consideration of the Senate's part in the making of treaties and of appointments. Apparently without previous formal treaty debate in the Convention, August 6, the Committee on Detail had brought in the proposal: 'The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.'<sup>1</sup> Opposition developed at once to allowing the Senate to make treaties. It was declared that this power 'belonged to the Executive department';<sup>2</sup> that the Senate could 'sell the whole Country by means of treaties';<sup>3</sup> that 'the President should be an Agent in treaties, inasmuch as the Senate represented the States alone.'<sup>4</sup> Gouverneur Morris urged an amendment that 'no treaty shall be binding on the United States which is not ratified by law,'<sup>5</sup> and it was pointed out that, although the Convention had refused the previous day to permit even the Legislature to lay duties on exports, yet under the proposed clause 'the Senate alone can make a treaty, requiring all the rice of South Carolina to be sent to some one particular port.'<sup>6</sup> The Morris amendment was defeated, and the entire proposal was referred to the Committee of Eleven. Its report of September 4 transferred the treaty-making power from the Senate to the President, 'by and with the advice and consent of the Senate.'<sup>7</sup>

In debate upon this new proposal, Wilson urged an amendment requiring that treaties — since they were to have the operation of law and therefore ought to have the sanction of laws — be made with the advice and consent of the House as well as of the Senate.<sup>8</sup> Sherman thought that this power could safely be trusted to the Senate, and that 'the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.'<sup>9</sup> Wilson's amendment received the support of only his own state, and the committee's proposal was then unanimously agreed to.

Pronounced difference of opinion developed over the clause: 'But no treaty shall be made without the consent of two thirds of the

<sup>1</sup> Madison, *Debates*, 342. Art. IX, sec. 1. June 26, in debate on the Senators' method of election, Wilson had incidentally remarked: 'The Senate will probably be the depository of the treaty-making power.'

<sup>2</sup> *Ibid.*, 404. Mercer.

<sup>3</sup> *Ibid.*, 404. Mason.

<sup>4</sup> *Ibid.*, 458. Madison.

<sup>5</sup> *Ibid.*, 458.

<sup>6</sup> *Ibid.*, 458.

<sup>7</sup> *Ibid.*, 508.

<sup>8</sup> *Ibid.*, 528.

<sup>9</sup> *Ibid.*, 528. Sept. 7.



members present.' Several members protested that this would put it in the power of a minority to control the will of a majority,<sup>1</sup> and that such an exceptional vote in the Senate was not necessary, since 'the Executive was here joined in the business.' Madison urged an amendment to authorize 'a concurrence of two thirds of the Senate to make treaties of peace without the concurrence of the President,' on the ground that 'the President would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace';<sup>2</sup> But this proposal was defeated by a heavy vote. Madison also made an unsuccessful effort to exempt treaties of peace from the requirement of the two-thirds vote, to allow them 'to be made with less difficulty than other treaties.'<sup>3</sup> Wilson wanted the requisition of two-thirds struck out altogether, declaring:

If the majority cannot be trusted, it was a proof that we were not fit for one Society. . . . The minority may perpetuate war against the sense of the majority.<sup>4</sup>

But his proposal received only Delaware's support.<sup>5</sup> Attempts to require for ratification 'the consent of two thirds of all the members of the Senate,' or 'a majority of the whole number of the Senate,' were both defeated. Finally the committee's proposal was adopted, only three states voting against it. As accepted after its return from the 'Committee of stile,' the provision took the form which it holds in the Constitution: 'He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.'

<sup>1</sup> Madison, *Debates*, 530. Wilson and King.

<sup>2</sup> *Ibid.*, 530.

<sup>3</sup> *Ibid.*, 530. Agreed to, without objection, the next day this exception was struck out by a vote of 8 to 3.

<sup>4</sup> *Ibid.*, 532.

<sup>5</sup> Theoretical reasons which influenced the adoption of the two-thirds rule in the treaty-making clause were supported by two specific aims: the retention of the right to navigate the Mississippi River and protection of Americans' fishing privileges in Newfoundland waters. These two conditions had been urged by the Continental Congress among the terms upon which it would consent to make peace. Both of them had been mentioned by Gouverneur Morris as two great objects of the Union. Williamson and Grayson later testified to the important influence exercised by these balanced interests of Northern and Southern states; and they figured in the debates in the ratifying conventions in several of the states. R. Earl McClendon, 'Origin of the Two-Thirds Rule in Senate Action upon Treaties,' *American Historical Review* (July, 1931), 768-72.

## THE SENATE'S POWERS AS TO APPOINTMENTS

Randolph's Plan included the recommendation that the National Executive 'ought to enjoy the Executive rights vested in the Congress by the Confederation.'<sup>1</sup> What were 'Executive rights'? In the first debate over the Executive, Wilson declared: 'The only powers he considered strictly Executive were those of executing the laws, and appointing officers not appertaining to and appointed by the Legislature.'<sup>2</sup> On Madison's motion it was promptly voted that a National Executive be instituted, 'with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for.'<sup>3</sup> Thus this general power of appointment was assigned to the National Executive before any conclusion had been reached as to the nature of that Executive or the mode of its choice. When the National Judiciary came under consideration a few days later, Wilson at once opposed the appointment of judges by the National Legislature, declaring:

Experience shewed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. . . . A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.<sup>4</sup>

Madison shared these doubts as to legislative intrigue and partiality, and questioned the qualifications of the House of Representatives for making such choices.

On the other hand, he was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous eno' to be confided in — as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments.<sup>5</sup>

A few days later his proposal that the judges' appointment be by the Senate was agreed to in Committee of the Whole without dissent. When this clause came before the Convention, the same difference of opinion was shown. Some favored Senate appointment of judges on the ground that Senators would bring into their deliberations 'a more diffusive knowledge of characters.' A Massachusetts delegate advocated the system which he said had been ratified by the experience

<sup>1</sup> Madison, *Debates*, 25.

<sup>2</sup> *Ibid.*, 39.

<sup>3</sup> *Ibid.*, 39. June 1. In this form it was agreed to without dissent in the Convention (*ibid.*, 270) and sent to the Committee of Detail (*ibid.*, 335). Meantime, June 4, it had been agreed that there should be 'a single Executive.'

<sup>4</sup> *Ibid.*, 57.

<sup>5</sup> *Ibid.*, 58.



of a hundred and forty years in his own State — 'that the judges be nominated and appointed by the Executive, by and with the advice and consent of the 2nd Branch,' but his motion at the moment met with little favor.<sup>1</sup> After some further debate, only three states voted against the proposition that judges be 'appointed by the 2nd Branch.'<sup>2</sup> Such was the resolution which went to the Committee on Detail, from which (August 6) came the recommendation: 'The Senate of the United States shall have power to make treaties, and to appoint Ambassadors and Judges of the Supreme Court.'<sup>3</sup> This provision aroused opposition from some of the ablest members of the Convention. Gouverneur Morris 'considered the body as too numerous for the purpose; as subject to cabal, and as devoid of responsibility,' and, in view of the pending proposal that the Senate try impeachment cases, he insisted that it would be 'particularly wrong to let the Senate have the filling of vacancies which its decrees were to create.'<sup>4</sup>

Side by side with this assignment to the Senate of the power 'to appoint Ambassadors and Judges of the Supreme Court,' the Committee of Detail proposed that the President 'shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution.'<sup>5</sup> At Madison's suggestion 'officers' was struck out and 'to offices' inserted, 'in order to obviate doubts that he might appoint officers without a previous

<sup>1</sup> Madison, *Debates*, 277. Gorham.

'Advice and Consent.' There is some basis for the belief that, as used in the Constitution in relation to the Senate's action upon nominations and treaties, the phrase 'advice and consent' meant simply 'affirmance by vote.' Edward B. Whitney developed this argument thus: (a) The phrase, 'advice and consent,' had had an accepted meaning, as a phrase, for centuries before 1787 — it meant simply 'affirmative vote.' (b) The separate significance of 'advice' had long been lost sight of. (c) From what is known of the Convention of 1787, we have no reason to believe any new use of the phrase was in the minds of its delegates. He directed attention to the fact that the use of this phrase apparently grew out of a motion by Gorham (Mass.) 'that the judges be nominated and appointed by the Executive by and with the advice and consent of the second branch.' 'This mode,' he said, 'has been ratified by the experience of a hundred and forty years in Massachusetts.' Gorham had long held important colonial and state offices in Massachusetts, and was a member of the committee in the Convention of 1780 which proposed the clause in the Massachusetts Constitution on which he now modeled his motion in the Federal Convention.

From the restricted use of this phrase for centuries in Parliament, as meaning simply 'affirmative vote,' and from Gorman's citation of this Massachusetts experience, Whitney argued the word 'advice' in this phrase 'is to be treated historically and not literally' in interpreting the Constitution. Letter to New York *Nation*, XLII, 125, Feb. 11, 1886. See also Robert Luce, *Legislative Problems*, 123-29.

<sup>2</sup> Madison, *Debates*, 303. Massachusetts, Pennsylvania, and Virginia.

<sup>3</sup> *Ibid.*, 342.

<sup>4</sup> *Ibid.*, 455. Wilson agreed with him in these criticisms.

<sup>5</sup> *Ibid.*, 343.

creation of the offices by the Legislature,'<sup>1</sup> and it was then voted to substitute for the whole clause:

and shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law.<sup>2</sup>

The Committee of Eleven, reporting September 4, got rid of the incongruous division of the appointing power between the President and the Senate by transferring the initiative in regard to appointments to the Executive. They proposed:

The President . . . shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise herein provided for.<sup>3</sup>

In the debate upon this proposition, Wilson 'objected to the mode of appointing as blending a Branch of the Legislature with the Executive. . . . Responsibility is in a manner destroyed by such an agency of the Senate.' But Gouverneur Morris replied: 'As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.'<sup>4</sup> The provision as to the appointing power was then agreed to, substantially as finally phrased in the Constitution.

#### AMENDING MONEY BILLS

Hardly any other provision of the Constitution which in experience proved of slight importance received such frequent and protracted debate as that in regard to the Senate's relation to the origination of 'Money Bills.' In the report of the Committee of Eleven, July 5, was the recommendation that

all bills for raising or appropriating money, and for fixing the Salaries of the officers of the Govern<sup>t</sup> of the U. States shall originate in the 1<sup>st</sup> branch of the Legislature, and shall not be altered or amended by the 2<sup>d</sup> branch.<sup>5</sup>

This proposal, as members of the committee repeatedly warned the Convention, was a feature of the compromise, the small states making this concession to the large states that exclusive origination of money bills should be assigned to the House as an offset to the

<sup>1</sup> Had Madison here in mind the possible creation of 'Kitchen Cabinets' or 'Brain Trusts'?

<sup>2</sup> Madison, *Debates*, 464.

<sup>3</sup> *Ibid.*, 508.

<sup>4</sup> *Ibid.*, 528-29.

<sup>5</sup> *Ibid.*, 206. The development of this recommendation into its final form is well traced by Charles Warren, in *The Making of the Constitution*, 275-77.

large states' concession that in the Senate each state should have equal representation. Madison at once opposed its adoption, declaring:

If the Senate should yield to the obstinacy of the 1<sup>st</sup> branch the use of that body as a check would be lost. If the 1<sup>st</sup> branch should yield to that of the Senate, the privilege would be nugatory. Experience had also shewn both in G. B. and the States having a similar regulation that it was a source of frequent & obstinate altercations.<sup>1</sup>

Referring to the American state constitutions' experiments with this discrimination, Wilson said that it 'would be found to be a trifle light as air.'<sup>2</sup> If an exclusive right of origination were to be given to either branch, he thought its assignment to the Senate would be 'most proper, since it was a maxim that the least numerous body was the fittest for deliberation; the most numerous for decision.' Gouverneur Morris declared the distinction would prove useless or pernicious. He said:

The restriction if it has any real operation will deprive us of the services of the 2<sup>d</sup> branch in digesting & proposing money bills of which it will be more capable than the 1<sup>st</sup> branch. It will take away the responsibility of the 2<sup>d</sup> branch, the great security for good behavior. It will always leave a plea, as to an obnoxious money bill that it was disliked, but could not be constitutionally amended; nor safely rejected. It will be a dangerous source of disputes between the two Houses.<sup>3</sup>

Nevertheless the provision was adopted by the Convention, July 6. It came back practically unchanged from the Committee of Detail, August 6. To the motion to strike out this section, 'as giving no peculiar advantage to the House of Representatives, and as clogging the Gov<sup>t</sup>,'<sup>4</sup> came Mason's rejoinder that 'to strike out the section was to unhinge the compromise of which it made a part...' His idea of an aristocracy was that it

was the govern<sup>t</sup> of the few over the many. An aristocratic body, like the screw in mechanics, worki<sup>g</sup> its way by slow degrees, and holding fast whatever it gains, should ever be suspected of an encroaching tendency. The purse strings should never be put into its hands.<sup>5</sup>

The whole section was struck out, only four states voting No; but three days later, on motion of Randolph, this vote was reconsidered. Opinions differed astonishingly as to the importance of this section. Randolph regarded it 'as of such consequence, that as he

<sup>1</sup> Madison, *Debates*, 207.

<sup>2</sup> *Ibid.*, 217.

<sup>3</sup> *Ibid.*, 218.

<sup>4</sup> *Ibid.*, 362.

<sup>5</sup> *Ibid.*, 362.



valued the peace of this Country, he would press the adoption of it.' Franklin and others considered 'the two clauses, the originating of money bills, and the equality of votes in the Senate, as essentially connected by the compromise which had been agreed to.'<sup>1</sup> On the other hand, many insisted that it was of no advantage to the large states — Wilson called attention to the fact that Pennsylvania and Virginia had uniformly voted against it — and that it might be a dangerous source of contention between the two Houses.<sup>2</sup> Mason made the shrewd forecast:

The Senate is not like the H. of Rep<sup>s</sup> chosen frequently and obliged to return frequently among the people. They are to be chosen by the Sts for 6 years, will probably settle themselves at the seat of Gov<sup>t</sup> will pursue schemes for their own aggrandizement — will be able by weary<sup>g</sup> out the H. of Rep<sup>s</sup> and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose.<sup>3</sup>

Madison predicted that the Senate might 'actually couch extraneous matter under the name' of amendment — a prophecy which has been abundantly fulfilled!<sup>4</sup>

When brought to a vote, 'the exclusive originating of money bills in the House of Representatives' was defeated, four states voting Aye, seven voting No.<sup>5</sup>

A vote 'on originating by the House of Representatives and amending by the Senate' resulted in the same alignment of the states. The discussion was reopened, August 15, when Strong introduced an amendment providing for the exclusive origination of money bills by the House, with the additional clause, 'but the Senate may propose or concur with amendments as in other cases.' But action was by vote postponed 'till the powers of the Senate should be gone over,' on motion of a member who declared, 'Many would not strengthen the Senate if not restricted in case of money bills.'<sup>6</sup> Three weeks later the Committee of Eleven — whose report led to radical changes

<sup>1</sup> Madison, *Debates*, 365.

<sup>2</sup> *Ibid.*, 366. Wilson, Ellsworth, Madison, Read.

<sup>3</sup> *Ibid.*, 389.

<sup>4</sup> *Ibid.*, 391. For comments by Dickinson, Rutledge, and Carroll, see 393-94.

<sup>5</sup> *Ibid.*, 395. On this question the Virginia delegation was divided, Blair and Madison voting No, Randolph, Mason and Washington voting Aye. Madison comments on Washington's vote thus: 'He disapproved & till now voted ag<sup>t</sup> the exclusive privilege, he gave up his judgment he said because it was not of very material weight with him & was made an essential point with others who if disappointed, might be less cordial in other points of real weight.'

<sup>6</sup> *Ibid.*, 404.

in the method of electing President and in the relations between President and Senate — reported a new phrasing of this section:

All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate.<sup>1</sup>

It is to be noted that in this revision for the first time there is cut out reference to bills for ‘appropriating money, and for fixing the salaries of officers of Government,’ and that the Senate’s power to amend, instead of being denied, is explicitly affirmed. Before brought to a vote, the provision was so amended as to substitute for the words, ‘and shall be subject to alterations and amendments by the Senate,’ those used in the constitution of Massachusetts in reference to the same subject — ‘but the Senate may propose or concur with amendments as on other bills.’<sup>2</sup>

## THE SENATE’S JUDICIAL POWERS

---

### SETTLING OF INTERSTATE CONTROVERSIES

The Convention considered the assignment of two quasi-judicial functions to the Senate. In the first place, the Committee of Detail gave to that body a power which under the Confederation had been exercised by the Congress — the power to settle disputes and controversies between states regarding territory or jurisdiction.<sup>3</sup> But when the Convention had made provision for a Supreme Court, with little hesitation the elaborate section relating to the settling of these interstate controversies by the Senate was struck out — ‘the Judiciary,’ as Wilson said, ‘being a better provision.’<sup>4</sup>

<sup>1</sup> Madison, *Debates*, 512. Sept. 5. Madison commented: ‘Col. Mason Mr. Gerry & other members from large States set great value on this privilege of originating money bills. Of this the members from the small States, with some from the large States who wished a high mounted Govt. endeavored to avail themselves, by making that privilege, the price of arrangements in the constitution favorable to the small States, and to the elevation of the Government.’ (*Ibid.*, 517.)

<sup>2</sup> *Ibid.*, 537.

<sup>3</sup> *Ibid.*, 342. Art. IX, sec. 2.

<sup>4</sup> *Ibid.*, 461.



## THE TRIAL OF IMPEACHMENTS

In the matter of impeachment trials, on the other hand, the Convention's deliberations led to a transfer of judicial functions in the reverse direction. The Virginia Plan had provided for 'a National Judiciary,' with jurisdiction over 'impeachments of any National officers.'<sup>1</sup> The New Jersey Plan provided for 'a federal Judiciary,'<sup>2</sup> with 'authority to hear & determine in the first instance on all impeachments of federal officers.' The report of the Committee of Detail included in the jurisdiction of the Supreme Court 'the trial of impeachments of officers of the United States.'<sup>3</sup>

Under each of these proposals it was noted that judges would be triable by the judiciary. August 20, the Committee of Detail was directed to report 'a mode of trying the Supreme Judges in cases of impeachment,'<sup>4</sup> and two days later that committee reported a recommendation that 'the judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives.' Without having been acted upon, this clause was referred to the Committee of Eleven together with the clause relative to the Supreme Court's general jurisdiction over the trial of impeachments. In its report of September 4, the committee shifted all impeachment trials away from the Court by the provision, 'The Senate of the United States shall have power to try all impeachments.'<sup>5</sup>

Objection was raised to making the Senate the court for the trial of impeachments in the case of the President, on the ground that it would make the President too dependent on the Legislature. 'If he opposes a favorite law, the two Houses will combine ag<sup>st</sup> him, and under the influence of heat and faction throw him out of office.'<sup>6</sup> Madison would have preferred the Supreme Court for such trials, but his motion to that effect was defeated by a heavy vote,<sup>7</sup> the delegates being persuaded that the Supreme Court 'were too few in number and might be warped or corrupted,'<sup>8</sup> as they were presidential appointees, and that, as the President could be turned out in four years, there would be no danger of the Senators' forswearing themselves as to their belief that the President was guilty of crimes.

<sup>1</sup> Madison, *Debates*, 25.

<sup>2</sup> *Ibid.*, 103.

<sup>3</sup> *Ibid.*, 344.

<sup>4</sup> *Ibid.*, 429.

<sup>5</sup> *Ibid.*, 507.

<sup>6</sup> *Ibid.*, 536. Pinckney.

<sup>7</sup> *Ibid.*, 535-36.

<sup>8</sup> *Ibid.*, 535. Gouverneur Morris.

## CRITICISM OF THE SENATE IN THE STRUGGLE OVER RATIFICATION

---

No sooner had the draft of the Constitution been made public than its every article was made the subject of keen criticism, which continued through the months when ratification was in doubt. On almost every controverted point the most significant arguments on both sides were those presented by men who had been members of the Federal Convention, and who were now using well-worn arguments in an attempt to convince a new jury.

### EQUALITY OF REPRESENTATION

The provisions relating to the Senate's makeup and powers did not become major subjects of controversy. In most of the states there seems to have been general acquiescence in the Great Compromise which accorded equal representation to the states in the Senate in compensation for a degree of proportional representation in the House. But Patrick Henry, in the Virginia Convention, denounced this 'equality of suffrage' as 'the rotten part of this Constitution. . . . The two petty states of Rhode Island and Delaware, which together are infinitely inferior to this state in extent and population, have double her weight, and can counteract her interest.'<sup>1</sup> Randolph, who had refused to sign the Constitution, mentioned this equality of suffrage in the Senate first among the points 'most repugnant to my wishes,' yet in the same sentence he acknowledged that it was one which 'cannot be corrected,' and that if this concession had not been made, 'we must have arisen perhaps in disorder.'<sup>2</sup>

One of the most comprehensive statements of dissatisfaction with the Constitution's provisions as to the Senate came from the pen of another Convention delegate who had refused to sign the draft. In a widely circulated broadside, George Mason summed up his reasons:

The Senate have the power of altering all money bills, and of originating appropriations of money and the salaries of the officers of their

<sup>1</sup> Elliot, *Debates*, III, 324.

<sup>2</sup> P. L. Ford, *Pamphlets on the Constitution*, 275.

own appointment, in conjunction with the President of the United States — although they are not the representatives of the people or amenable to them. These, with their other great powers (viz. their powers in the appointment of ambassadors and all public officers, in making treaties, and in trying all impeachments;) their influence upon, and conjunction with, the supreme executive from these causes; their duration of office; and their being a constant existing body, almost continually sitting, joined with their being one complete branch of the legislature, will destroy any balance in the government, and enable them to accomplish what usurpations they please, upon the rights and liberties of the people.<sup>1</sup>

In 'Answers to Mr. Mason's Objections to the New Constitution,' James Iredell of North Carolina took up each objection, analyzed it, and subjected it to criticism so searching as to make this pamphlet one of the most effective of the whole period of struggle.<sup>2</sup>

#### ELECTION BY STATE LEGISLATURES

It is significant that the one feature of the Senate which a century later gave rise to many years of controversy, finally resulting in the Seventeenth Amendment — the election of Senators by state legislatures — seems to have aroused no serious protest in any state.

#### BLURRING OF LEGISLATIVE AND EXECUTIVE POWERS

The most frequently recurring criticism was against the blurring of executive and legislative functions between the President and the Senate, with the menace of their setting up an aristocratic government. Wilson (Pennsylvania),<sup>3</sup> Davie (North Carolina),<sup>4</sup> and Dickinson (Delaware),<sup>5</sup> in their several states made effective rejoinders, pointing out the checks upon any such possible assault on democracy. Dickinson insisted that the scheme of representation was 'not a mere compromise,' and that 'Machiavel and Caesar Borgia together could not form a conspiracy in such a senate, destructive of any but themselves and their accomplices.' Especial anxiety was expressed in various conventions as to the assignment of the treaty-making power. James Monroe, who within three years was to become Senator, and a few years later to become President, made a most gloomy forecast as to this connection of the Senate with the Executive.

Has it not an authority over all the acts of the Executive? What are the acts which the President can do without them? What number is requisite to make treaties? A very small number. Two thirds of those

<sup>1</sup> Ford, *Pamphlets*, 329.

<sup>2</sup> *Ibid.*, 331-70, especially 337-42 and 355-56.

<sup>3</sup> *Ibid.*, 158.

<sup>4</sup> Elliot, *Debates*, IV, 119-30.

<sup>5</sup> Ford, *Pamphlets*, 173.



who may happen to be present, may, with the President, make treaties that shall sacrifice the dearest interests of our territories — which may dismember the United States. There is no responsibility, or power to punish it.<sup>1</sup>

Patrick Henry, voicing his apprehensions in almost the same words, added: 'In short, if anything should be left us, it would be because the President and Senators were pleased to admit it.'<sup>2</sup> But Madison was prompt and effective in his rejoinder.<sup>3</sup>

#### TRIAL OF IMPEACHMENTS

There was a somewhat widespread criticism of the power given to the Senate to try all impeachments on the ground that this was a blending of the executive with the legislative and judicial departments which would be 'likely to screen the offenders impeached, because of the concurrence of a majority in the Senate in their appointment.' To this criticism, M'Kean, in the Pennsylvania Convention, replied that the President would be the responsible person, since it was he who would nominate; and that 'when such an impeachment shall be tried, it is more than probable that not one of the Senate, who concurred in the appointment, will be a Senator, for the seats of a third part are to be vacated every two years, and of all in six.'<sup>4</sup>

#### AMENDING MONEY BILLS

The right of the Senate to amend money bills met with vigorous protest. In the Virginia Convention, Grayson demanded: 'Why should the Senate have the right to intermeddle with money, when the representation is neither equal nor just?'<sup>5</sup> When Madison argued

<sup>1</sup> Elliot, *Debates*, III, 221.

<sup>2</sup> *Ibid.*, 500. Other Virginians who saw menace in the exercises of the treaty-making power were Mason (Ford, *Pamphlets*, 330), R. H. Lee (*ibid.*, 312), and Randolph (*ibid.*, 275). The Petition of the Harrisburg Convention contained a proposal that no future treaty should be deemed to alter or affect any law of the United States or of any particular State 'until such treaty shall have laid before and assented to by the House of Representatives in Congress.' *Independent Gazetteer*, Sept. 15, 1787.

<sup>3</sup> One of the most pointed and succinct defenses of the Constitution's provision as to treaties is to be found in Ramsay's 'Address to the Freemen of South Carolina.' Ford, *Pamphlets*, 376.

<sup>4</sup> Elliot, *Debates*, II, 534. The Virginia Convention, in ratifying the Constitution, urged that future Virginia Senators and Representatives favor an amendment providing: 'That some tribunal other than the Senate be provided for trying impeachments of senators.' (*Ibid.*, III, 661.) The North Carolina Convention recommended the same. To a surprising extent members of the Federal Convention differed as to whether Senators would be triable in impeachments by the Senate.

<sup>5</sup> *Ibid.*, 377.

that if the Senate were not given the right to propose amendments, it would have no recourse but to reject entirely an unsatisfactory bill, as in South Carolina, where a similar restriction was continually a source of disputes, Grayson replied that he still considered the power of proposing amendments to be the same, in effect, as that of originating, and added the prophetic words:

The Senate could strike out every word of the bill, except the word *whereas*, or any other introductory word, and might substitute new words of their own.<sup>1</sup>

#### SENATORS' ELIGIBILITY TO OFFICE BY APPOINTMENT

In several state conventions anxiety was expressed that the eligibility of Senators to appointment to office under the National Government would lead to corruption. George Mason declared: 'It is a great defect in the Senate that they are not ineligible at the end of six years.'<sup>2</sup> In the Maryland Convention Martin urged that ineligibility to appointment until one year after the expiration of the time for which they were chosen was 'essentially necessary to preserve the integrity, independence and dignity of the legislature, and to secure its members from corruption.'<sup>3</sup>

#### LENGTH OF TERM

There was much criticism of the length of the Senator's term. Martin insisted — as did many others — that the Senators would lose interest in their home states, would settle down at the Capital, and seek to gain influence with the President.<sup>4</sup> Gerry declared that annual election was the basis of responsibility. In the Massachusetts Convention, General Thompson 'broke out in the following pathetic apostrophe: "O, my country! never give up your annual elections, young men, never give up your jewel."' One of his colleagues was of the same mind: 'Senators chosen for so long a time will forget their duty to their constituents. We cannot, said he, recall them. The choice of representatives was too long; the Senate was much worse.'

<sup>1</sup> Elliot, *Debates*, III, 377. (For illustrations of the Senates performing such 'major operation,' see *infra*, 439 ff.)

<sup>2</sup> *Ibid.*, 405.

<sup>3</sup> *Ibid.*, I, 366. The Virginia Convention proposed an amendment making ineligible to any civil office under the authority of the United States members of both branches of Congress, 'during the term for which they shall be respectively elected.' Compare with U.S. Constitution, art. I, sec. 6, par. 3.

<sup>4</sup> *Ibid.*, I, 344-89. Martin's long-winded letters: *The Genuine Information*, to the Maryland legislature (361).



Ames and King, a former member of the Federal Convention, defended the six-year term for men charged with the peculiar and heavy responsibilities assigned to the Senate; but Doctor Taylor, unconvinced, after referring to the checks in the Articles of Confederation, 'which provide for delegates being chosen annually, for rotation, and the right of recalling,' continued:

But in this [Constitution], they are to be chosen for six years; but a shadow of rotation provided for, and no power to recall; and concluded by saying, that if they are once chosen, they are chosen forever.<sup>1</sup>

In the New York Convention this fear, that a six-year term would make the Senators lose all sense of responsibility to their constituents, led Gilbert Livingston to urge an amendment providing,

That no person shall be eligible as a Senator for more than six years in any term of twelve years, and that it shall be in the power of the legislatures of the several states to recall their Senators, or either of them, and to elect others in their stead, to serve for the remainder of the time for which such Senator or Senators, so recalled, were appointed.<sup>2</sup>

Lansing, a member of the Federal Convention, immediately came to the support of this 'recall' amendment, but it was strongly opposed by Chancellor Livingston, who held that 'rotation was a species of ostracism driving experience into obscurity,'<sup>3</sup> and by Hamilton, who insisted that the effect of such an amendment would take away the stability of Government by depriving the Senate of its permanency, and 'by assimilating the complexion of the two branches to destroy the balance between them. The amendment will render the Senator a slave to all the capricious humors among the people.'<sup>4</sup>

#### THE 'FEDERALIST'S' DEFENSE OF THE SENATE

Especial interest attaches to the discussion of the Senate in the *Federalist*. Its significance is due not more to the eminence of its authors than to the especial circumstances under which the project

<sup>1</sup> Elliot, *Debates*, II, 16, 28, 45-48. See Martin's views, *ibid.*, I, 361.

<sup>2</sup> *Ibid.*, 289. See also speech of Melancton Smith, *ibid.*, 310-11.

<sup>3</sup> *Ibid.*, 293.

<sup>4</sup> *Ibid.*, II, 303.

was formed and carried through. Recognizing that New York's ratification hung in the balance, yet that it was indispensable to the success of the whole enterprise, in October, 1787, Hamilton planned the bringing out of this series of newspaper essays, addressed 'To the People of New York,' making clear the country's needs and explaining the provisions of the proposed Constitution. To his assistance in this task he called Madison and Jay. The New York Convention met June 17, 1788, and ended its sessions July 26. After five weeks of spirited and anxious debate, ratification was carried by the narrow margin of three votes — 30 to 27. There can be little doubt that the turning of the scale was due to this extraordinarily able, informing, and persuasive series of brief expositions.

Most of them had appeared as letters to several New York newspapers, running from November, 1787, to the end of the following March; they had all been brought out in book form by the end of May. Before the particular essays which dealt with the Senate were published, the Constitution had already been ratified by six states, the hard-won victory in Massachusetts having been secured February 2, a month before 'Publius' reached the Senate topics in his addresses to the people of New York. It is not to be doubted that, in preparing the defense of the Constitution's provisions in regard to the Senate, the authors of the *Federalist* took careful note of the criticisms of that body which had been presented, not only in the Federal Convention and later in newspaper and pamphlet propaganda, but also in the debates of the six state conventions which had already rendered their verdict. Feeling the seriousness of their task to bring the defense needed to each point in accordance with its strategic importance or exposure to attack, what topics did 'Publius' select, and what stress did he give to them? Five numbers of the *Federalist* are specifically devoted to the Senate — Numbers 62 to 66 inclusive; and in three others — Numbers 75 to 77 — the discussion reverts to those powers, already considered, which the President exercises by and with the advice and consent of the Senate.

The election of Senators by state legislatures — the provision which later was to arouse greatest antagonism — was passed over with a single laudatory paragraph, characterizing it as the mode 'probably most congenial with public opinion' — as beyond all question it then was.

Equal representation in the Senate was defended as a recognition of sovereignty in the states. At great length was set forth the need of a

small upper House, as a security against improper and ignorant legislation and the infirmity of faction, and against 'mutability' in its councils because of changes of membership. From experience of the states of antiquity the author sought to prove that history shows no long-lived republic without a Senate, and that the Senate, as provided for in the Constitution, could not acquire a dangerous predominance.

Jay's experience as Secretary of Foreign Relations doubtless led to his preparing the discussion on the Senate's treaty-making power. He emphasized the importance of committing this power to an assembly of picked men, and pointed out the great advantage of their long term and gradual rotation. The secrecy and dispatch, often requisite in treaty negotiation, he insisted would be better assured in such a body than in one like the House of Representatives, and he stressed the responsibility which would be felt by the Senate. When Hamilton recurred to this topic in discussing the President's treaty-making power, he assailed the 'trite' criticism of the 'intermixture of powers,' declaring his firm persuasion that the joint action of President and Senate was 'one of the best digested and most unexceptionable parts of the plan.' After recapitulating the points made by Jay for preferring action on treaties by the Senate rather than by the House, he proceeded to defend the requirement that ratification be by two-thirds of the Senators present rather than by two-thirds of the entire membership, a requirement which would have been likely in many cases to 'amount in practice to a necessity of unanimity.'

In discussing the appointing power, Hamilton insisted that the alleged blurring of functions would yield no bad results, but that the concurrence of the Senate would serve as a check on favoritism. In emphasizing the stability which Senate concurrence would give to the administration, Hamilton said: 'The consent of that body would be necessary to displace as well as to appoint.' Taken by itself, this seems to assert a belief that formal concurrence of the Senate would be necessary in case of the President's attempting to remove an official; but the context indicates that Hamilton's meaning may have been that a President would not make a removal if he felt sure that disapproval of such action would make it certain that the Senate would refuse to confirm the appointee whom he might name to fill a vacancy thus caused.

Hamilton felt it necessary at considerable length to defend the Senate's 'sole power to try all impeachments.' He pointed out the defects in proposals which had been advanced for the exercise of this



power by some other tribunal. After a faint-hearted insistence that even if this power in the Senate were not desirable, the Constitution should not on that account be rejected, he replied to criticisms which had been made upon this feature — the blurring of legislative and judicial functions, the tendency toward aggrandizing the Senate, the danger of too lenient judgment by the Senate in the case of officials for whose confirmation it had voted, and, lastly, the objection that the Senators might be called upon to try some of their own members for a corrupt use of the treaty-making power. Hamilton acknowledged that this contingency might arise, thus putting on record his opinion that under the Constitution a Senator was an impeachable 'civil officer of the United States.'<sup>1</sup>

To win New York's adherence to the Constitution had been the main object of the writers of the *Federalist*. But while that State's convention was still in the midst of its deliberations came the announcement that by the ratification of the ninth state — New Hampshire, June 21, 1788 — the Constitution had been ratified in the manner therein declared to be sufficient for its establishment. In the words of Chancellor Livingston to the New York Convention: 'The Confederation is now dissolved.'<sup>2</sup>

The record justifies John Adams's declaration that ratification was 'extorted from the grinding necessities of a reluctant people.' In the long struggle since the opening of the Federal Convention the 'Second

<sup>1</sup> *State Ratifying Conventions' Proposals of Amendments as to the Senate:*

Following the precedent which had been set by the Massachusetts Convention of suggesting amendments, the four states which acted after the Constitution had been formally established accompanied their ratifications with resolutions suggesting desired amendments. Of the proposals relating to the Senate, the one most frequently advanced related to the process of impeachment. The Virginia and North Carolina recommendations were identical: 'That some Tribunal other than the Senate be provided for trying impeachments of Senators.' New York recommended that the court for the trial of all impeachments 'shall consist of the Senate, the Judges of the Supreme Court of the United States, and the first or Senior Judge for the time being, of the highest Court of general and ordinary common Law Jurisdiction in each State.'

Dissatisfaction with the long term is evidenced by the New York resolution: 'That no Person be eligible as a Senator for more than six years in any term of twelve years'; and both New York and Rhode Island proposed that there be reserved to the state legislatures the power to recall their federal Senators, and to elect others in their stead. New York proposed that the authority given to state executives to fill vacancies in the Senate be abolished, and that such vacancies be filled by the respective legislatures.

Virginia favored amending the treaty-making procedure so as to provide that no commercial treaty should be ratified without the concurrence of two-thirds of the whole number of members of the Senate; and that no treaty ceding territory, etc., be ratified 'without the concurrence of three fourths of the whole number of both houses respectively.'

<sup>2</sup> June 25, 1788. Elliot, *Debates*, II, 322.

Branch' had again and again been the theme of heated debate. For its design there was no serviceable model. Hardly any other feature of the Convention's work received such close study. Concession and compromise characterized every stage of the process. In the contest over ratification it was clear that the Constitution framers themselves held most diverse views as to the Senate. What would be its part and influence in the new Government?

The Constitution had at last been *constructed* — but it remained to be *construed*.<sup>1</sup> More than a century and a quarter was to pass before change was made in a single word of the Constitution's provisions as to the Senate. Yet before Washington took the oath as President, usage and interpretation had already begun to transform the Senate into a body far different from that which had figured in the hopes or in the fears of the men by whom it had been planned.

#### REFERENCES

---

Elliot, *Debates: Records of the Convention and of the Ratifying Conventions. The Debates in the Federal Convention of 1787*. Reported by James Madison.

Edited by Gaillard Hunt and James Brown Scott (1920).

*The Records of the Federal Convention of 1787*. Edited by Max Farrand (1927). Collected Writings of Washington, Madison, Hamilton, Jay, King, and Jefferson.

Bancroft, George. *History of the Formation of the Constitution*.

Farrand, Max. *The Framing of the Constitution*.

Meigs, William M. *The Growth of the Constitution*.

Warren, Charles. *The Making of the Constitution*.

*Creation of the Senate of the United States*. A Monograph prepared by George J. Schulz, Director, Legislative Reference Service, Library of Congress. (75th Cong., 1st sess. S. Doc. 45. 1937.)

<sup>1</sup> In his *Constitutional and Political History of the United States*, after setting forth in detail the struggles and the compromises in the Federal Convention, Professor Von Holst entitled his next chapter, 'The Worship of the Constitution.'



## II

---

### SETTING SENATE PRECEDENTS IN THE FIRST CONGRESS

---

---

★

Many things, which appear of little consequence in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general government.

PRESIDENT WASHINGTON. (May 11, 1789)

He (President Washington) is but a man, but a really good one, and we can have nothing to fear from him, but much from the precedents which he may establish.

SENATOR WILLIAM MACLAY. (January 19, 1790)

Far more than the rules, the precedents govern the Senate.

SENATOR GEORGE H. MOSES. (July 25, 1931)

---

★

## II

---

### SETTING SENATE PRECEDENTS IN THE FIRST CONGRESS

---

#### SECURING A QUORUM

---

THE first precedent which the Senate seemed likely to set was that of the delay of public business. The Senate was unconscionably long 'a-borning.' On March 4, 1789, the day appointed for the starting of the new Government, only eight of the Senators already elected appeared in New York, and took their seats in the room assigned for their use in Federal Hall. New Hampshire, Connecticut, and Pennsylvania were fully represented; one Senator had arrived from Massachusetts and one from faraway Georgia, but more than a fortnight passed before any Senator appeared from New Jersey or Delaware, while the New York members were not elected until midsummer.<sup>1</sup>

After a week of adjourning from day to day, the eight Senators sent a letter to the ten others already elected, earnestly requesting 'that you will be so obliging as to attend as soon as possible.' At the end of another week, not a single additional Senator having appeared, a second and more urgent appeal was sent out. Gradually the stragglers

<sup>1</sup> The arrival of Senators from some states was delayed by a severe storm making travel impossible. Letter from Madison to Jefferson, March 29, 1789. Madison, *Works*, I, 458.

In New York the delay was due to a deadlock in the New York legislature — an earnest of many a blocked senatorial election in later years. Federalists controlled the New York Senate and claimed that Senators should be chosen by a concurrent vote, by which their party would have secured at least one; Anti-Federalists were in majority in the Assembly, and insisted that the Senators should be chosen by joint ballot, which would give both Senators to them. It therefore proved impossible to effect an election before that legislature's adjournment.

put in an appearance, but it was not until April 6 that the completion of a quorum made possible the Senate's organizing. Meantime, the House had effected its organization, April 1, by the choice of its Speaker and other officers. Its committee was at work on the rules of the House, and April 9, when the Senate had merely reached the stage of appointing a committee for receiving the President, the House was already settling down to debate such practical matters as the duties to be imposed on rum and molasses.

On April 30, nearly two months after the date set for the inauguration of the new Government, after taking the oath of office on the balcony of the Federal Hall in the presence of the populace, President Washington returned to the Senate Chamber, and delivered his inaugural address before the members of the two branches of the Congress there assembled. Maclay notes: 'This great man was agitated and embarrassed more than ever he was by the leveled cannon or pointed musket. He trembled, and several times could scarce make out to read.' He spoke of the reluctance with which he responded to his country's summons, and of the magnitude and difficulty of the trust he was called to assume. The surest pledges of success, in the grand enterprise that lay before them, he found in the 'honorable qualifications, . . . the talents, the rectitude and the patriotism,' of those who had been elected to Congress.

#### THE PERSONNEL OF THE SENATE IN THE FIRST CONGRESS

---

These were not the words of merely conventional compliment. For most of those into whose faces he looked were men well known to him, men whose character and ability he had seen put to the severest tests on the battlefield and in halls of legislation.

The Senate in that First Congress included eleven men — just half of the total attendance during the first session — who had been members of the Constitutional Convention.<sup>1</sup> During five fateful

---

<sup>1</sup> Dr. C. O. Paullin, *Iowa Journal of History and Politics* (1904), 3-33. 'The First Elections under the Constitution.' Attention is called to the fact that those elected were mostly moderates, as candidates of the type of Hamilton and Henry did not



months General Washington, as presiding officer, had watched the Constitution taking shape under the hands of these very men who now, with him, were to put its power into effect. Among those Senators were seven who had been officers in the Continental Army, including General Philip J. Schuyler, who had been an aide to General Washington, and Benjamin Hawkins, who for years had served on his staff as interpreter; there were four signers of the Declaration of Independence; there was Robert Morris the financier of the Revolution; there was William Maclay, whom Washington probably had never seen, but who was to be the most critical observer of the doings of President and of Senate in that First Congress.<sup>1</sup> Of the twenty-six Senators, nineteen had been members of the Continental Congress or of the Congress of the Confederation. Nearly three-quarters of the Senators had served in state legislatures, and many had taken part in the conventions which framed the state constitutions, or which ratified the Constitution of the United States. Eleven of the Senators were college graduates, and twelve others had more or less of academic training.<sup>2</sup> Seventeen of the twenty-six were men of legal training, and more than half of these became judges.

In age the Senate hardly justified its name. The average age of its members was only forty-eight, and more than half of them were on the

'run' well. That membership in 'the immortal Convention' was no especial recommendation to the voters is evident from the fact that only nine of the sixty-five Representatives had been members of that body.

<sup>1</sup> See *Journal of William Maclay, United States Senator from Pennsylvania, 1789-1791*. Dr. J. Franklin Jameson deplors the fact that for much that took place behind the closed doors of the Senate Chamber during the First Congress 'we have no other ample record except that of this atrabilious and parvanimus creature. . . . Most readers think that because Maclay says that men acted thus and so, they actually did. "All things look yellow to the jaundiced eye." Everything this contemptible creature set down is poisoned and distorted by his mean malignancy.' He was a man of the bitterest prejudices, and never hesitated to impute unworthy motives to others. He avowed his belief that 'there is very little candor in New England men.' Vice-President Adams was his *bête noire*: almost every reference to him is derisive. To Maclay, Hamilton was a 'damnable villain,' the machinations of whose 'gladiators' and 'hired partisans' he thought he detected at many a critical juncture in the Senate. A psychiatrist would note that Maclay suffered from dyspepsia, rheumatism, headache, nostalgia, and a pronounced 'inferiority complex.' With due allowance made for Maclay's unwholesome personality, his record of the Senate in the First Congress is a valuable source of information, and his acrid humor is often highly entertaining. (See Charles A. Beard's introduction to the 1927 revision of the *Journal*. In this book, page references are to the 1890 edition.)

<sup>2</sup> Dr. Paullin finds that in the First Congress 42 per cent of the Senators were college graduates. Of these four were from Harvard, three from Princeton, and one each from Yale, Dartmouth, Oxford, and Cambridge. In the Fifty-Seventh Congress he finds that but 35 per cent of the Senators were college graduates, but comments that such comparisons are not very enlightening, because of the uncertainty as to the content of different college curriculums.

sunny side of fifty. The oldest member, Doctor William S. Johnson, President of Columbia College, was sixty-two; the youngest member, Rufus King, was thirty-four when he took his seat.

It is to be noted that in its early years the Senate was a very small body. The first session was nearly ended before its membership exceeded twenty — a group less unwieldy for the discharge of the delicate functions in which the Senate is associated with the Executive than is, for example, the present Senate Committee on Foreign Relations, with a membership of twenty-three. Association in so small a group made for intimate acquaintance, for accurate appraisal of each member's ability and motives. Maclay, the diligent diarist, pictures many an informal and homely scene in that Senate Chamber; for example, the session on a chill May morning, when the members left their seats and gathered about the fireplace. With that little group, meeting behind closed doors — for five years the sessions of the Senate were secret and the debates were not published — contrast the Senate of today, a body of nearly one hundred men, holding open or only quasi-secret sessions, in a huge chamber, at times compassed about with a great cloud of witnesses, and ever conscious that the radio, the associated press, 'leave to print,' and the franking privilege in effect extend that spacious gallery till it includes the remotest hamlet in the land.

#### CLASSIFICATION OF SENATORS

---

The Constitution provided that immediately after the Senators should be assembled in consequence of the first election they should be divided as equally as might be into three classes, and that the seats of the Senators in the several classes should be vacated at the expiration of the second, the fourth, and the sixth year so that one-third might be chosen every second year.

Obviously the immediate assignments to the classes assuring the longer terms were greatly to be preferred, and the procedure of classification might give rise to charges of favoritism. Hence resort was made to choice by lot. May 11, 1789, the Senate ordered that a committee of

three designated Senators consider and report a mode of effecting classification. A few days later this committee presented its report. It grouped the twenty Senators whose credentials had already been received into three classes, each of which was geographically representative; and contained the names of not more than one Senator from any one state. The committee recommended:

That three papers of an equal size, numbered 1, 2 and 3, be, by the Secretary, rolled up and put into a box and drawn by Mr. Langdon, Mr. Wingate, and Mr. Dalton, in behalf of the respective class in which each of them are placed; and that the classes shall vacate their seats in the Senate according to the order of numbers drawn for them, beginning with No. 1; and that, when Senators shall take their seats from states which have not yet appointed Senators, they shall be placed by lot in the foregoing classes, but in such manner as shall keep the classes as nearly equal as may be in numbers.<sup>1</sup>

The recommendations were adopted and the first classification was thus made. When the New York Senators presented themselves, two months later, the procedure was as follows:

Two lots, No. 3 and a blank, being by the Secretary rolled up and put into the box, Mr. Schuyler drew a blank; and Mr. King, having drawn No. 3, his seat shall, accordingly be vacated in the Senate at the expiration of the sixth year.

The Secretary proceeded to put two other lots into the box, marked Nos. 1 and 2, and Mr. Schuyler having drawn lot No. 1, his seat shall, accordingly, be vacated in the Senate at the expiration of the second year.<sup>2</sup>

#### SOCIAL RELATIONS BETWEEN THE PRESIDENT AND SENATORS

---

Within twenty-four hours of General Washington's arrival in New York, most of the members of both branches of Congress had gone to his house to pay their respects. There were ultra-Democrats among them who did it with reluctance. Says Maclay: 'What a perfidious

<sup>1</sup> *Senate Journal*, 25; G. P. Furber, *Precedents Relating to the Privileges of the Senate of the United States*, 190-203; Roger Foster, *Comments on the Constitution*, I, 483-84.

<sup>2</sup> *Senate Journal*, 48.



custom it is! I, however, whipped downstairs and joined the Speaker and a number more of the Pennsylvanians, who were collecting for that purpose. Went, paid my respects, etc. Mind this, not to resent it, but to keep myself out of his power.' <sup>1</sup>

For the next few days before his inauguration General Washington was in the midst of a whirlwind round of calls. Early one morning he was announced at Senator Maclay's lodgings. 'We asked him to take a seat. He excused himself on account of the number of his visits. We accompanied him to the door. He made us complaisant bows — one before he mounted and the other as he went away on horseback.' <sup>2</sup>

The President took with great seriousness everything which might result in establishing a precedent. Hardly had he been inaugurated when he appealed to the Vice-President, to Hamilton, Jay, and Madison, for advice as to the ordering of his social intercourse. 'Many things,' he wrote, 'which appear of little consequence in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general government.' He desired so to mark out the line of his social relations as to allow himself time for all the duties of his office, and to 'avoid as much as may be the charge of superciliousness, and seclusion from information, by too much reserve and too great a withdrawal of himself from company on the one hand, and the inconveniences as well as a diminution of respectability, from too free an intercourse and too much familiarity on the other.' He believed that the presidents of the old Congress had allowed their dignity and effectiveness to be seriously impaired by their indiscriminate hospitality, till they were considered in no better light than as *maîtres d'hôtel*.<sup>3</sup>

As a result of this advice-seeking, the President gave it to be understood that he would return no visits; that receptions to the public would be on specified days; and that his entertaining at dinner would be confined to 'official characters and strangers of distinction.' <sup>4</sup> For the most part this line of conduct was in accord with the recommendations submitted by Vice-President Adams. But to some members of the Senate the program seemed to savor too much of exclusiveness. Maclay writes: For the President 'to suffer himself to be run down, on

<sup>1</sup> William Maclay, *Journal*, 1.

<sup>2</sup> *Ibid.*, 4.

<sup>3</sup> Washington, *Writings* (Sparks ed.), X, 466. 'Queries by the President, respecting the system of conduct to be adopted by him in his private intercourse,' May 11, 1789. Letter to Madison, May 12, *ibid.*, 3-5.

<sup>4</sup> *Ibid.*, p. 465. Letter of July 26, 1789, to his kinsman, Dr. David Stuart, of New York, *ibid.*, 17-23.



the one hand, by a crowd of visitants so as to engross his time, would never do, as it would render the doing of business impracticable; but, on the other hand, for him to be seen only in public on stated times, like an Eastern Lama, would be equally offensive.' <sup>1</sup>

The President's levees were well attended, but to the Pennsylvania Senator they seemed hurtful as tending to interfere with public business and make men idle, and he feared that 'from these small beginnings we shall follow on, nor cease, until we have reached the summit of court etiquette, and all the frivolities, fopperies and expense practiced in European governments.'<sup>2</sup> His record of one of these functions reads: 'Went to the levee, made my bows, walked about, turned about and came out.'<sup>3</sup> He regarded these receptions as anti-Republican, and deplored the fact that Republicans were borne down by fashion and the fear of being charged with a want of respect to General Washington, of whom he wrote: 'He is but a man, but a really good one, and we can have nothing to fear from him, but much from the precedents which he may establish.'<sup>4</sup>

During his service in the First Congress Senator Maclay was bidden six times to the President's Thursday dinners. Of one of them he writes: 'It was a great dinner — all in the taste of high life. I considered it as a part of my duty as a Senator to submit to it, and am glad it is over. The President is a cold, formal man, but I must declare that he treated me with great attention . . . yet he knows how rigid a Republican I am. I cannot think that he considers it worth while to soften me. It is not worth his while. I am not an object if he should gain me, and I trust he cannot do it by any improper means.'<sup>5</sup> Another was 'a dinner of dignity. All the Senators were present, and the Vice-President. I looked around the company to find the happiest faces . . . The President seemed to bear in his countenance a settled aspect of melancholy. No cheering ray of convivial sunshine broke through the cloudy gloom of settled seriousness.'<sup>6</sup>

To what extent President Washington distributed his invitations with a view to 'softening' Senators who were inclined to oppose the measures which he favored can only be surmised. Certainly Maclay was a most suspicious old democrat, ever ready to fancy an antagonism or a slight where none was felt or intended. At one time he told his *Journal*: 'The President's neglect of me can be no secret. How unworthy of a great character is such littleness! He is not aware, how-

<sup>1</sup> Maclay, *Journal*, 15.

<sup>2</sup> *Ibid.*, 69.

<sup>3</sup> *Ibid.*, 256.

<sup>4</sup> *Ibid.*, 176-77. Jan. 14, 1790.

<sup>5</sup> *Ibid.*, 177.

<sup>6</sup> *Ibid.*, 206.

ever, that he is paying me a compliment that none of his guests can claim. He places me above the influence of a dinner even in his opinion.' <sup>1</sup> Yet within a week he received a card of invitation to dine with the President, and comments: 'The pet, if he had any on him, has gone off.' <sup>2</sup> Probably President Washington's invitations were issued at the behest of duty, with magnanimous indifference to the opinions or activities of the individual guest.

---

#### SENATE ADDRESSES TO THE PRESIDENT

---

In the first few months of the new Government matters of form and ceremony in the Senate's relations with the President gave some of the members grave concern. No sooner had the Senate returned to its own chamber from attendance at prayers in Saint Paul's Chapel, immediately after the President's inaugural, than it was at once unanimously agreed that a committee of three should be appointed to prepare an answer to the President's speech. A week later the committee reported. Practically a whole day was devoted to the consideration of the draft which they submitted. 'It was read. One part was objected to, which stated that the United States had been in *anarchy* and *confusion* and the President stepping in and rescuing them. A very long debate. The words were struck out. Mr. Patterson offered a clause. "Rescued us from evils *impending over us*." This was carried; but nearly half the Senate made sour faces at it. Mr. Elsworth said it was tautological.' Then the substance as well as the style of the sentence was objected to, as 'fixing a stain on the annals of America.' Reconsideration was carried, and the committee retired for the purpose of 'dressing their draft.' During their absence Vice-President Adams discoursed *con amore* on the manner of delivering the address to the President. The committee returned with a bettered draft and the reading went smoothly till reference was made to the hope that the President's administration would bring to his country 'dignity and splendor.' 'Splendor!' Some democrat challenged 'splendor' as too suggestive of 'all the faulty finery, brilliant scenes, and expensive

<sup>1</sup> Maclay, *Journal*, 248.

<sup>2</sup> *Ibid.*, 255.

trappings of royal government.' He suggested 'respectability' as a substitute, but 'splendor' was retained, to the Vice-President's great joy!<sup>1</sup>

On the day when the engrossed address was brought into the Senate, debate was renewed on verbal changes, and long discussion took place as to whether it should be signed by John Adams as 'Vice-President' or as 'President of the Senate.' Finally, at the appointed day and hour, the Senators took carriages to the President's house, where with trembling hand and great agitation John Adams read the address to the President, who showed no little constraint and embarrassment in reading his reply.<sup>2</sup> This long-discussed address pledged the Senate's cheerful co-operation in 'every measure which might strengthen the Union.' The President's response was little else than an expression of his gratification at this assurance.

This precedent was followed at the opening of each successive session of Congress.<sup>3</sup> It obviously became boring to both parties. Maclay characterized one of these addresses as 'the most servile echo' he had ever heard — 'it repeated all the [President's] words entire.'<sup>4</sup> The time came when President Washington could only reply in such terms as these: 'Gentlemen: These assurances . . . make the impression on me which I ought to feel,' etc.<sup>5</sup> On returning from the second of these ceremonials Maclay wrote: 'I think both the Senators and representatives are tired of making themselves the gazing-stock of the crowd and the subjects of remark by the sychophantic circle that surround the President in stringing to his quarters.'<sup>6</sup>

Nevertheless, this 'echo' address was kept up for a dozen years. During his own presidency, John Adams showed his fondness for speech-making and ceremonies by elaborating his replies. When Jefferson put an end to the President's delivering his address in person<sup>7</sup> at the opening of each session of Congress, this threadbare ceremonial ceased.

<sup>1</sup> Maclay, *Journal*, 20-22.

<sup>2</sup> *Ibid.*, 41-42.

<sup>3</sup> Parton pictures this ceremonial as follows (*Life of Aaron Burr*, I, 182):

Fancy a long dining room, with the tables and chairs removed. Before the fireplace stands a tall and superb figure, clad in a suit of black velvet with black silk stockings and silver buckles. His hair, white with powder, is gathered behind in a silk bag. He wears yellow gloves, and holds a cocked hat with a cockade and plume. A sword, with hilt of polished steel and sheath of white leather, further relieves the somber magnificence of the President's form. The Senators enter, with Vice-President Adams at their head, and form a semi-circle around the President while Mr. Adams reads the address.

<sup>4</sup> Maclay, *Journal*, 175-76.

<sup>5</sup> *Messages and Papers of the Presidents*, J. D. Richardson, ed. (hereafter referred to as *Messages*), I, 85. Dec. 13, 1790.

<sup>6</sup> Maclay, *Journal*, 176.

<sup>7</sup> For reasons assigned, see *Messages*, I, 325.



THE SENATE AND TITLES

---

In reading the minutes of the Senate's session immediately following the delivery of the inaugural address, the clerk, using the phrase which Vice-President Adams had suggested to him, referred to the President's 'most gracious speech.'<sup>1</sup> Forthwith arose Senator Maclay in protest. 'The words prefixed to the President's speech are the same that are usually placed before the speech of his Britannic Majesty. I know they will give offense. I consider them as improper. I move that they be struck out.' And struck out they promptly were, by vote of the Senate, despite the Vice-President's long remarks in advocacy of 'a dignified and respectable government.'

This outburst of ultra-democratic sentiment augured ill for another project which soon plunged the Senate into hot debate. A week before the inauguration, the Senate had chosen a committee 'to consider and report upon what style or title it will be proper to annex to the offices of President and Vice-President of the United States, if any other than those given in the Constitution.' The House appointed a committee to confer with this Senate committee upon the matter. Their joint report, that 'it is improper to annex any style or title to the respective styles or titles of office expressed in the Constitution,' was adopted without a dissenting voice in the House. The Senate did not agree to it.<sup>2</sup> There the debate was renewed at great length. A proposal that the President should be addressed as 'His Excellency' was voted down, and the question of titles was referred to a new committee, which was instructed to confer with such committee as the House might appoint for that purpose. This gave rise to heated debate among the Representatives. Not one of them advocated titles, but to avoid any seeming discourtesy to the Senate, conferees were finally appointed. They could not agree. The Senate committee reported that 'in the opinion of the committee it will be proper thus to address the President; "His Highness, the President of the United States of America, and Protector of their Liberties."' Consideration of this report, how-

<sup>1</sup> Maclay, *Journal*, 10.

<sup>2</sup> *Ibid.*, 24.



ever, was postponed, and the Senate adopted a resolve to the effect that the 'Senate have been induced to be of opinion that it would be proper to annex a respectable title to the office of the President of the United States,' but that, inasmuch as the House had recently presented an address to the President without the addition of any title, the Senate 'think it proper for the present to act in conformity with the practice of that House; therefore, *Resolved*, That the present address be "To the President of the United States," without addition of title.' <sup>1</sup>

And here this pother over titles ended. It was believed to have originated mainly at the insistence of the Vice-President who had a strong penchant for pomp and ceremony. In his zeal Adams did not hesitate to strain the proprieties of his position as President of the Senate, not only by interjecting remarks while members were speaking, but by haranguing the Senate again and again, at great length, on the importance of titles. 'The President,' said he, 'must be himself something that includes all dignities of the diplomatic corps and something greater still. What will the common people of foreign countries, what will the sailors and soldiers say, "George Washington, President of the United States"? They will despise him *to all eternity*!' <sup>2</sup>

But the President wrote to his kinsman, Doctor David Stuart (who had reported to him: 'Nothing could equal the ferment and disquietude occasioned by the proposition respecting titles'), that the matter had given him much uneasiness, lest he should be supposed to be in favor of such titles. He declared that the question was moved before his arrival and without his knowledge, and was urged after he was apprised of it contrary to his opinion, for, he said: 'I foresaw and predicted the reception it has met with, and the use that would be made of it by the adversaries of the government. Happily this matter is now done with, I hope never to be revived.' <sup>3</sup>

A few weeks later the question arose in the Senate whether its members should be styled 'Honorable' on the minutes. Again the Vice-President showed his zeal for titles, now urging that for Senators the style should be 'The Right Honorable.' Lee, characterized by Maclay as 'the high priest in all this idolatrous business,' supported him, but the proposal encountered violent opposition, and no action was taken. <sup>4</sup>

<sup>1</sup> Maclay gives a spirited account of this debate. *Journal*, especially 22-29, 31-36.

<sup>2</sup> *Ibid.*, 27.

<sup>3</sup> Washington, *Writings* (Sparks ed.), X, 20.

<sup>4</sup> Maclay, *Journal*, 65-66.

## THE SENATE'S RELATION TO APPOINTMENTS

---

Within a week of his inauguration and before any office had been created by act of Congress, President Washington wrote: 'I anticipate that one of the most difficult and delicate parts of the duty of my office will be that which relates to nominations for appointments.'<sup>1</sup> Ten months of experience only confirmed his fears, for he then declared: 'Nomination to office is the most irksome part of the executive trust.'<sup>2</sup>

Hardly had he taken the oath of office when he found himself beset with applications from relatives, from former officers or their widows, and others, seeking to secure nominations through some personal claim. To all of these he replied, with friendly consideration but with unyielding insistence that qualifications for the particular office must be the sole test. 'I only wish . . . that candidates for office would save themselves the trouble and consequent expense of personal attendance. All that I require are the names and such testimonials with respect to abilities, integrity and fitness, as it may be in the power of the several applicants to produce. Beyond this, nothing with me is necessary or will be of any avail in my decisions.'<sup>3</sup>

### HOW SHOULD THE SENATE'S ADVICE AND CONSENT BE GIVEN?

The very first nomination which the President submitted to the Senate raised fundamental questions. June 15, 1789, a communication from the President informed the Senate that Mr. Jefferson, Minister of the United States to the Court of France, wished permission to return to the United States for a few months, and that the President thought it proper to comply with that request. 'To take charge of American

<sup>1</sup> To Edward Rutledge, May 5, 1789. *Writings*, X, 3.

<sup>2</sup> To John Armstrong, Feb. 6, 1791. *Ibid.*, 136.

<sup>3</sup> Letter to Mary Wooster, N.Y., May 21, 1789. *Writings*, X, 6; letter to Bushrod Washington, N.Y., July 27, 1789. *Ibid.*, X, 23. See Hamilton's comments on the Appointing Power, *Federalist*, No. 66; also, letters of John Adams to Roger Sherman, July 20, 1789, *Life and Writings of John Adams*, VI, 433-35, and to Thomas Jefferson, December 6, 1787, *ibid.*, VIII, 464.

affairs at the Court in his absence,' the message continued, 'I nominate William Short, Esq., and request your advice on the propriety of appointing him.'<sup>1</sup>

In putting this matter before the Senate, Vice-President Adams spoke at considerable length as to the form in which the Senate's advice and consent should be given. Senator Maclay at once took the ground that the business was in the nature of an election, and that the spirit of the Constitution was clearly in favor of procedure by ballot. This opened a debate in which half the members of the Senate took part. Maclay and his supporters insisted that in voting every Senator was likely to be subjected to inconveniences from two sources: openly voting against the President's nominees would be a sure mode of losing his favor, and it would expose the Senator to the resentment of those whose appointments he had opposed. They insisted that in *viva-voce* voting the hopes and fears of the electors were so wrought on by the wealthy, powerful, and bold that few votes were given entirely free from influence. On the other hand, Senator Robert Morris and his supporters took the ground that to give their advice and consent by ballot was below the dignity of the Senate, which should be open, bold, and unawed by any consideration whatever. Vice-President Adams set forth his views with the utmost frankness: 'He read the Constitution, argued and concluded: "I would rise in the chair, and put the question individually to the senators: Do you advise and consent that Mr. Short be appointed *chargé d'affaires* at the Court of France? Do you, and do you?"'<sup>2</sup>

When at last the question was put it was decided that the consent of the Senate to the President's nominations be given by ballot.<sup>3</sup> Those who lost in this vote showed 'fretful uneasiness' — especially the Vice-President, who declared that nothing like the Senate's decreeing that their advice and consent should be by ballot had ever been heard before in history. He raised the question, what kind of commission the nominee was to have, saying, 'This must be settled by ballot.' His queries, writes Maclay, 'set us afloat,' and 'an hour and a half was lost in the most idle discourse imaginable.' Finally it ended in the passing of a resolution that the President be informed that 'the Senate advise and consent to his appointment of William Short.'

<sup>1</sup> *Messages*, I, 68.

<sup>2</sup> Maclay, *Journal*, 80.

<sup>3</sup> *Ibid.*, 81. By vote of 11 to 7.



## THE FIRST REJECTION: 'SENATORIAL COURTESY'

A few weeks later, however, this whole question was reopened. August 3, 1789, the President sent to the Senate 'a list of about one hundred appointments as collectors, naval officers and surveyors.' The tedious balloting upon these names continued, and at the end of the second day all had been confirmed with the exception of a single nomination which apparently was not acceptable to the Senators from Georgia. August 5 the Senate gave further consideration to this nomination of one Benjamin Fishbourn for the position of Naval Officer for the Port of Savannah, and, the record reads: 'Upon the question to advise and consent to the appointment, it passed in the negative.' And the Secretary, according to order, laid a certified copy of the proceedings before the President of the United States — the first rejection, be it noted, of one of the President's nominations. A motion that in the opinion of the Senate their advice and consent should be given in the presence of the President was postponed, until the following day, when it was again put aside, upon the appointment of three Senators as a committee to 'wait upon the President and confer with him on the mode of communication proper to be pursued between him and the Senate in the formation of treaties and making appointments to office.'<sup>1</sup>

The next day, August 7, there was read in the Senate a special message from the President, submitting a new nomination in place of that of Benjamin Fishbourn. While thus making no effort to force a rejected nomination upon the Senate (as many of his successors have done), the President set forth in detail the considerations which had led him to make the original appointment — Colonel Fishbourn's distinguished and irreproachable conduct as an officer in active service under General Washington's own eye, the abundant evidence of the high regard in which he was held in Georgia, and of his exceptional qualifications for the particular office for which he had been named. 'Permit me to submit to your consideration,' the message continued, 'whether on occasions when the propriety of nominations appear questionable to you, it would not be expedient to communicate that circumstance to me, and thereby avail yourselves of the information which led me to make them, and which I would with pleasure lay before you.'<sup>2</sup>

<sup>1</sup> Gales and Seaton, *History of Debates in Congress* (hereafter referred to as *Annals of Congress*), I, 56.

<sup>2</sup> *Messages*, I, 58-59. Aug. 6, 1789.



## THE PRESIDENT'S CONFERENCE WITH THE SENATE COMMITTEE

It was on the day following the transmittal of this sharp message to the Senate that the President first met the committee appointed to confer with him upon the proper mode of communication, in relation to treaties and nominations. It is to be borne in mind that a postponed motion was still awaiting action in the Senate, declaring that in their opinion the Senate's advice and consent should be given in the presence of the President. While the committee assured the President that the only object the Senate had in view was to learn what mode of communication would be most agreeable to the President, to which a perfect acquiescence would be yielded, he saw clearly that 'oral communication [of the nomination] was the point they aimed at.' All three of them were opposed to balloting on nominations, and one of the committee frankly declared that his wish for the President's presenting the nominations in person in the Senate was to bring about a *viva-voce* vote in that body. The President replied that nothing would sooner induce him to relinquish his mode of nomination by written messages than to accomplish that end.<sup>1</sup>

President Washington set forth clearly his own opinion, that nominations had best be made by written messages. With the sharp message which he had sent to the Senate the previous day clearly in the minds of both the President and the Senators, he told them:

It could be no pleasing thing, I conceive, for the President, on the one hand, to be present and hear the propriety of his nominations questioned, nor for the Senators, on the other hand, to be under the smallest restraint from his presence from the fullest and freest inquiry into the character of the person nominated. The President, in a situation like this, would be reduced to one of two things, either to be a silent witness of the decision by ballot, if there are objections to the nomination, or in justification thereof (if he should think it right) to support it by argument; neither of which might be agreeable, and the latter improper; for, as the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.<sup>2</sup>

Thus the matter was allowed to stand for a few days' consideration, during which time the President wrote to Madison, bluntly asking him: 'What do you think I had best do?'<sup>3</sup> Madison's reply apparently has not been preserved, but when the President next met the committee, he put his views very positively before them, declaring that in the exercise of this power of advice and consent in relation to

<sup>1</sup> Washington, *Writings* (Sparks ed.), X, 25. Aug. 9, 1789.

<sup>2</sup> *Ibid.*, 434.

<sup>3</sup> *Ibid.*, 25.

treaties and appointments, the Senate 'is evidently a council only to the President, however its concurrence may be to his acts. It seems incident to this relation between them, that not only the time but the place and manner of consultation should be with the President.' Especially as to the manner of communication, he intimated that the opinion both of the President and Senators might be changed by experience. 'On some occasions it may be most convenient that the President should attend the deliberations and decisions on his propositions; on others that he should not, or that he should not attend the whole of the time.' His suggestion, therefore, was that the Senate 'should accommodate their rules to the uncertainty of the particular mode and place that may be preferred, providing for the reception of either oral or written propositions, and for giving their consent and advice in either the *presence* or *absence* of the President, leaving him free to use the mode and place that may be found most eligible and accordant with other business, which may be before him at the time.'<sup>1</sup>

#### THE SENATE'S RULE AS TO ACTION ON NOMINATIONS

The Committee yielded as to the President's preference, and upon their report, the Senate passed a resolution to the effect that when the President's nominations should be submitted in writing, after due consideration, 'all questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent by answering *viva voce*, ay or no.'<sup>2</sup> By this action, against Maclay's earnest protest, the Senate reversed its previous vote in favor of passing upon nominations by ballot.

Despite all this conference and debate, no instance has been noted when President Washington in person communicated nominations to the Senate, nor is it known that he was ever present when nominations made by him were being considered by the Senate. From time to time protest was made that nominations were submitted of men about whom the Senators knew nothing, but this was 'got over by the members rising and giving an account of the officers appointed from the several States, and all were agreed to.'<sup>3</sup>

The Fishbourn nomination was not only the first but the only

<sup>1</sup> *Writings*, X, 486.

<sup>2</sup> *Annals of Congress*, I, 65. Aug. 21, 1789. President Harding, in person, communicated to the Senate the nomination of members of his Cabinet, including two of his former colleagues in the Senate. (March 4, 1921.)

<sup>3</sup> Maclay, *Journal*, 282.

nomination rejected by the Senate of the First Congress. But some encountered a good deal of opposition.<sup>1</sup>

Even when nominations were made by a President as conscientious and unaggressive as Washington, captious critics found fault. Several were disgruntled at the President's acknowledgment that he had consulted members of the House in regard to his nominations, but had not done this with members of the Senate, inasmuch as they would have an opportunity of giving their advice and consent later. Maclay professed to believe that the President had been showing 'a courtship and attention to the House of Representatives, that by their weight he may depress the Senate and exalt prerogative on the ruins.'

#### MIGHT THE SENATE 'NEGATIVE THE GRADE'?

A minor question in connection with the Senate's giving its advice and consent arose in the consideration of the very first nomination which was submitted to the Senate. The Vice-President himself raised the question, what rank the appointee was to hold, the President having nominated William Short to 'take charge of our affairs' at the Court of France in the absence of the minister. After long discussion the Senators seem to have dodged the decision by adopting a resolution which merely declared their advice and consent in favor of the nominee.<sup>2</sup>

Apparently with a view to being prepared in case controversy on this point should arise, the President made formal application to his Secretary of State for an opinion, whether the Senate had the right to negative the grade the President might think it expedient to use, as well as the person to be appointed. Jefferson replied: 'I think the Senate has no right to negative the grade.' He developed his reasons at considerable length, insisting that the Senate was not supposed to be acquainted with the special circumstances which call for a mission to any particular place or of the grade, more or less marked, which special and secret circumstances may call for. 'All this is left to the President. They are only to see that no unfit person be employed.' He acknowledged that by 'continual negative on the person'

<sup>1</sup> In the second session, June 4, 1790, there was submitted a long list of nominations of consuls. Consideration of five of them — all foreigners — was postponed, and before the last of these was confirmed the Senate, June 17, put upon record a resolution 'That it may be expedient to advise and consent to the appointment of foreigners to the offices of consuls, or vice-consuls for the United States,' a motion having been defeated which would have required that such appointments be confined to citizens of the United States except in cases of urgent necessity.

<sup>2</sup> Senate Journal, June 17, 1789. Maclay, *Journal*, 81.



the Senate might in effect 'exercise a negative of the grade,' but he considered that that would be 'a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed to be capable.'<sup>1</sup>

---

#### THE SENATE AND THE POWER OF REMOVAL

---

'The message about Mr. Short touches a matter that may be drawn into a precedent.'<sup>2</sup> So wrote Senator Maclay, ever suspicious of anything that might tend toward a stretching of the Executive power. He noted that, in nominating Mr. Short to supply Minister Jefferson's place, the President did not lay before the Senate the question whether permission should be given for Jefferson's absence from his post. 'Granting this power to be solely with the President,' he continues, 'the power of dismissing ambassadors seems to follow, and some of the courtiers in the Senate fairly admit it.'<sup>3</sup> Maclay, on the other hand, insisted that the Senate's concurring in the appointment of the substitute fully implied its consent to the return of the principal; 'that if we chose to prevent the return of Mr. Jefferson, it was only necessary to negative the nomination of Mr. Short or of any other to fill his place.'

Thus the very first appointment submitted to the Senate started some of its members to trying to determine their relation to the power of removal. When next this question came before the Senate, the issue was squarely raised, and, singularly, after it had been the subject of long and heated debate in the House of Representatives.

The bill for establishing the Department of Foreign Affairs, after four days of debate in Committee of the Whole, came before the House for formal action containing a provision that the head of the depart-

<sup>1</sup> Thomas Jefferson, *Writings* (P. L. Ford, ed.), V, 161-62. The attitude of the Senate on this question was put to the test in the first session of the Second Congress, December 22, 1791, when the Senate held up for some time the nominations of ministers plenipotentiary at London and Paris and of a minister resident at The Hague, while they debated whether it was for the interest of the United States to appoint representatives of those grades to reside permanently at foreign courts. But, finally, persuaded that the exigencies of the time made these particular appointments desirable, they advised and consented to each of them.

<sup>2</sup> Maclay, *Journal*, 82.

<sup>3</sup> *Ibid.*, 82.



ment was to be appointed by and with the consent of the Senate, and 'to be removable by the President.' Upon that one phrase and upon that one phrase alone there developed the most searching debate. The issue was simply this: In removing incumbents from office, must the President have the concurrence of the Senate? The Constitution gave no answer to that question. Arguing to convince hesitating state legislatures that there would be no danger from the Executive power as provided in the Constitution, 'Publius' (Hamilton), without elaborating the point, had said in the *Federalist* that 'the consent of that body [the Senate] would be necessary to displace as well as to appoint.'<sup>1</sup> Only fifteen months later the question arose in the practical task of enacting an important law. In three days of debate upon this direct issue, Madison (the other 'Publius' of the *Federalist*) took the lead in asserting that the consent of the Senate was *not* necessary to displace as well as to appoint, but that, on the other hand, the power to remove an official was implicit in the general Executive power, and that, if it were restricted by the necessity of obtaining Senate concurrence, the President could not fulfill his constitutional duty to 'take care that the laws be faithfully executed.' Which 'Publius' was right?

That momentous consequences might follow from such a recognition of an implied power was clearly pointed out by the opposition. Said Tucker:

I would rather a law should pass vesting the power in *improper* hands, than that the Constitution should be wrongly construed. If we say the President may remove from office, it is a grant of power; we can repeal the law, and prevent the use of it. But if we, by law, imply that it is a Constitutional right vested in the President, there will be privilege gained, which the Legislature cannot affect; at least, the reversion of such a solemn opinion will occasion much inconvenience, not to say confusion.

But Madison's view prevailed. The bill passed the House by a vote of 29 to 22, in a form which avoided any suggestion of conferring the power of removal upon the President, but which at the same time contained clear recognition of his unrestricted power of removal as a matter of right under the Constitution. Of the eight Representatives who had been delegates in the Federal Convention only two, by voice or by vote, favored a senatorial check upon removals.<sup>2</sup>

<sup>1</sup> No. 77, April 4, 1788.

<sup>2</sup> Maclay commented: 'The House of Representatives had debated four days on a direct clause for vesting the President with this power; and, after having carried it

In the Senate the course of this bill was of momentous interest from the fact that one-half of the Senators present had been members of the Federal Convention, and also from the fact that if the bill should be passed in the form in which it came from the House it would result in the Senate's denying to itself the use of a most powerful check upon the President.

The bill's first section — for the establishment of a Department of Foreign Affairs — was promptly carried. Then was read the second clause, which had been the subject of such long debate in the lower House, relating to the appointment, by the Secretary, of a chief clerk, who should have charge of the records of the department, 'whenever the said principal officer shall be removed from office by the President of the United States.' Maclay records: 'There was a blank pause at the end of it. I was not in haste, but rose first.'

He set forth two main objections to the bill: First, the lessening of the power of the Senate, in that it took away any vote on the removal of officers, and also the power of advising and consenting in the case of one appointment of first importance; and, second, 'the placing of the President above business and beyond the power of responsibility, putting into the hands of his officers the duties required of him by the Constitution.' He insisted that the part assigned to the Senate by the Constitution was no less than that of being 'the great check, the regulator and corrector, or . . . the balance of this Government.' He instanced the Senate's power in legislation, its relation to treaties, and the fact that all appointments by the President must be made with the Senators' advice and consent, unless they should concur in passing a law divesting themselves of this power; and he insisted that common inference or induction could mean nothing else than that the same guard was equally necessary to prevent improper steps in removals as well as in appointments. At different stages in the debate he referred again and again to impeachment, a mode of removal which secured a fair hearing and trial, and declared: 'The Constitution certainly never contemplated any other mode of removing from office.'<sup>1</sup> Asserting that this clause was exceptional in every way, Maclay

with an open face, they dropped and threw out the clause, and have produced the same thing, cloaked and modified in a different manner by a side-wind.' (*Journal*, 120, July 18, 1789.) For Tucker's speech see *Annals of Congress*, I, 584. For the final action, *ibid.*, 591.

<sup>1</sup> Maclay, *Journal*, 110. In the House debate, Page had expressed the same view, but Madison declared: 'I believe the opinion is held but by one gentleman besides himself.' *Annals of Congress*, I, 605.

moved that it be stricken out. For nearly three days the debate continued upon that motion. Of the twenty members of the Senate all but four took part in that discussion of the Senate's power. It would seem that Ellsworth and Paterson were the principal upholders of the President's unrestricted power of removal, while Maclay, Lee, and Butler insisted that the recognition of any such implied power was unwarranted, dangerous, and in derogation of the rights of the Senate.<sup>1</sup>

Both in the Senate and in the House it was alleged that veneration for President Washington was inducing members to favor so construing the Constitution as to recognize the President's sole power of removal; and often in later generations — for example, by Webster — it has been intimated that this was the decisive factor leading to what the critics regarded as an incorrect decision.

The debate developed greater heat than any that had preceded it. Mr. Dalton acknowledged that 'from what has been said by the honorable gentleman from New Jersey (Mr. Paterson) he was now for the clause. Mr. Izard was so provoked that he jumped up; declared that nothing had fallen from that gentleman that could possibly convince any man; that men might pretend so, but the thing was impossible. Mr. Morris' face had reddened for some time. He rose hastily, threw censure on Mr. Izard; declared . . . that Paterson's arguments were good and sufficient to convince any man. The truth, however, was that everybody believed that John Adams was the great converter.'<sup>2</sup>

Each day, after adjournment as well as before the opening of the session, the Senators gathered in small groups for eager discussion. To Maclay all this looked very suspicious. 'I have seen more cabaling and meeting of members in knots this day than I ever observed before. . . . I see plainly public speaking on this subject is now useless, and we may put the question where [when] we please. It seems as if a court party were forming; indeed, I believe it was formed long ago.' The next morning, 'many were there before me. It was all huddling away in small parties. Our Vice-President was very busy indeed; he openly attacked Mr. Lee before me on the subject of the debate, and they were loud on the business. . . . And now recantation was in fashion. . . . We now saw how it would go, and I could not help admiring the frugality of the court party in procuring recantations, or votes, which you please.'

In the final vote, of the ten Senators who had been members of the

<sup>1</sup> Maclay, *Journal*, 109-16.

<sup>2</sup> *Ibid.*, 115.



Federal Convention, six declared against placing senatorial restriction upon the President's power of removal. Included in the six were two, Ellsworth and Paterson, who later became Justices of the Supreme Court.

When the debate came to an end, the vote resulted in a tie, and with what Maclay thought unseemly haste Vice-President Adams cried out: 'It is not a vote!' The giving of his casting vote to break this tie in favor of a recognition of the President's unrestricted power of removal John Adams considered one of the most important acts of his long public service.<sup>1</sup>

## THE SENATE AND TREATY-MAKING

---

### CONFERENCE WITH THE PRESIDENT

It has been already noted that the First Congress had been in session only three months when the Senate appointed a committee to confer with the President 'as to the mode of communication proper to be pursued between him and the Senate in the formation of treaties and making appointments to offices.' This committee was twice in conference with the President. According to his own memorandum, the very first 'sentiment' which he expressed to them was as follows:

In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained all of which not only require consideration, but some of them may undergo much discussion; to do which by written communications would be tedious without being satisfactory. Oral communications may be proper, also, for discussing the propriety of sending representatives to foreign courts, and ascertaining the grade of character, in which they are to appear, and may be so in other cases.<sup>2</sup>

<sup>1</sup> Maclay, *Journal*, 116. See notes on this debate taken by Vice-President Adams, and comment on this casting vote, by his grandson, Charles Francis Adams, *Life and Writings of John Adams*, I, 450 ff. July 16, 1789.

For further discussion of this debate and congressional construction of the power of removal in the First Congress, see Chapter XIV. Save for the years during which the Tenure of Office Acts stood upon the statute books, this construction of the power of removal has controlled. Finally, in the case of *Myers v. U.S.*, October, 1926, the Supreme Court, by a vote of five to three, affirmed this Madisonian construction of the President's power of removal. But this decision was qualified by that of *Humphrey's Executor v. U.S.*, 295 U.S. 602, decided May 27, 1935.

<sup>2</sup> Washington, *Writings* (Sparks ed.), X, 484.



At the second conference with the committee, the President elaborated the point that the place and the manner of communication 'should be with the President,' varying with his convenience and with the occasion, and he further intimated:

In treaties of a complicated nature, it may happen that he will send his propositions in writing, and consult the Senate in person after time shall have been allowed for consideration.<sup>1</sup>

Upon the recommendation of this committee, the Senate made provision for the formalities to be observed when the President should meet the Senate in the Senate Chamber, and adopted the rule:

All questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States, and the Senators shall signify their assent or dissent by answering *viva voce*, *Ay* or *No*.<sup>2</sup>

Hardly had this resolution been adopted when the Secretary of the President appeared with a special message:

Gentlemen of the Senate: The President of the United States will meet the Senate, in the Senate Chamber, at half-past eleven o'clock to-morrow, to advise with them on the terms of the treaty to be negotiated with the Southern Indians.

G<sup>o</sup> WASHINGTON.<sup>3</sup>

New York, Aug. 21, 1789.

# TRIAL OF 'ORAL CONFERENCE'

'Indispensably necessary' oral communications — as the President had characterized them — were to have an immediate trial. Before

<sup>1</sup> Washington, *Writings*, X, 485-86.

## EARLY CONFERENCES ON TREATIES

In the few weeks before the President and the Senate reached an agreement as to how their communications as to treaty-making should be carried on, several treaties had been the subject of direct conference between the President's representatives and the Senate. Of these the following are of some significance:

1. May 25, 1789. General Knox presented several treaties with certain Indian nations, negotiated under the order of the old Congress. He had been instructed to give the Senate such information as might be requested. In the absence of any such request, he withdrew.

2. June 11, 1789. By the President's order John Jay, who had been Secretary of Foreign Affairs, laid before the Senate a convention between the King of France and the United States which had been signed five years before. Several weeks later, in compliance with its formal request, he attended the Senate by appointment and made desired explanations. (*Senate Executive Journal*, I, 5-7.)

3. August 7, 1789. By an identical special message, sent by the hand of General Knox to the Senate and to the House, the President asked their judgment upon the expediency of executing a temporary commission to attempt to negotiate such a treaty with the Indians as would 'terminate all difficulties in the Southern district.'

<sup>2</sup> *Senate Executive Journal*, I, 19. Aug. 21, 1789.

<sup>3</sup> *Messages*, I, 61.

examining the record of this unique conference, it is best to call to mind some of the experiences which the President had recently had with the Senate. His first message, relating to treaties which had been negotiated with certain Indian nations of the North and North-west, sent to the Senate May 25, was not even referred to a committee for three weeks. It was two months later before that committee reported, and then the Senate postponed consideration for a fortnight. It was during this postponement that the President announced his intended meeting with the Senate in the Senate Chamber. It had taken six weeks to secure Senate approval of a consular convention with France. On the question of negotiations with the Southern Indians, the Senate had taken no action on the President's message until a bill had come up from the House; it had then debated three entirely different proposals, before finally concurring in the House bill which accorded with the spirit of the President's message. Even then, it had cut down by a fourth the appropriation which the bill would have placed at the President's disposal for carrying on these negotiations. Finally, both the President and the Senate had in vivid remembrance the Senate's rejection of that Fishbourn appointment, and the President's sarcastic message of only a fortnight prior to this meeting with the Senate.

There was, therefore, some degree of tension on both sides, on the morning of August 22, 1789, when the Senate Doorkeeper announced the arrival of the President of the United States. He was introduced and took the Vice-President's chair.<sup>1</sup> Soon he rose, and told the Senate that he had called on them for their advice and consent to some propositions respecting the treaty to be held with the Southern Indians. He said that he had brought with him General Knox, who was well acquainted with the business. The proposals were then hurriedly read to the Senate by the Vice-President. At the end of the paper were 'seven heads,' to which the Senators were asked to give their advice and consent. They were not so framed that this could be done by a mere 'yes' or 'no.'

The Vice-President then read the first of these seven heads. It referred back to some statements in the body of the paper. Mr. Morris then asked for a re-reading of the communication, which the Senators had not been able to hear because of the passing carriages.

<sup>1</sup> This account of the President's conference with the Senate follows Maclay's *Journal*, pp. 128-33 — apparently the only detailed record from the hand of one who was present. It is to be regretted that the one reporter was a man of such pronounced prejudice.

After this was done, the Vice-President at once read the 'first head' over again, and put the question: 'Do you advise and consent, etc.?' 'There was a dead pause. Mr. Morris whispered me: "We will see who will venture to break silence first."' The Vice-President was proceeding, 'As many as . . .,' when Senator Maclay arose, believing, as he writes in his *Journal*, that, if he did not, no one else would protest, and 'that we should have these advices and consents ravished in a degree from us.' He declared that the business was new to the Senate, and was of importance, and that it was the duty of the Senators to inform themselves as well as possible on the subject. He therefore called for the reading of the treaties and other documents alluded to in the paper which had been presented. As he did this, he records, 'I cast my eye at the President of the United States. I saw he wore an aspect of stern displeasure.' General Knox produced some of the documents in question. Senator Lee called for the reading of the particular treaty. 'The business labored with the Senate. There was an evident reluctance to proceed.' It was suggested that in relation to the first head new information might be secured from a man who had just arrived from the land of the Cherokees. The President rose and said that he had no objection to that article being postponed, and meantime he would see the messenger. The second article was decided in the negative and the third after spirited debate was postponed.

Believing that there would be no chance for a fair investigation of the subjects while the President sat there with his Secretary of War, to support his opinions and overawe timid and neutral Senators, Maclay had early whispered to his Pennsylvania colleague, Robert Morris, the suggestion that the best way to conduct the business would be to have all the papers committed. Morris moved that the papers communicated by the President of the United States be referred to a committee of five, to report on them as soon as might be. He was seconded by one of the Senators from Georgia, the state especially interested in these treaties, and the state whose Senators had defeated the confirmation of Fishbourn. In a long speech Senator Butler used Washington's own phrase, saying that the Senators were 'acting as "a council."' No council ever committed anything. Committees were an improper mode of doing business; it threw business out of the hands of the many into the hands of the few.' Maclay defended the mode of doing business by committees, and insisted that two days' delay could not prove serious. At this, says Maclay:



The President of the United States started up in a violent fret. 'This defeats every purpose of my coming here' were the first words that he said. He then went on that he had brought his Secretary of War with him to give every needed information; that the Secretary knew all about the business, and yet he was delayed and could not go on with the matter. He cooled down, by degrees, . . . but declared that he did not understand the matter of commitment. He might be delayed, he could not tell how long. He rose a second time, and said that he had no objection to postponement until Monday at ten o'clock. By the looks of the Senate this seemed agreed to. A pause for some time ensued. We waited for him to withdraw. He did so, with a discontented air. Had it been any other man than the man I wish to regard as the first character in the world, I would have said with sullen dignity.<sup>1</sup>

Years later in one of President Monroe's Cabinet meetings William H. Crawford asserted that, in resentment at the freeze-out he had just experienced, as he strode from the Senate Chamber President Washington declared 'that he would be damned if he ever went there again.'<sup>2</sup>

Maclay's comment continues:

I cannot now be mistaken. The President wishes to tread on the necks of the Senate. Commitment will bring the matter to discussion, at least in committee, where he is not present. He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left to us. This will not do with Americans. But let the matter work; it will soon cure itself.

The intervening Sunday enabled both the President and Senators to regain their equanimity. When the Senate met on Monday morning, 'the President of the United States soon took his seat and the business began.' To Maclay 'the President wore a different aspect from what he did on Saturday. He was placid and serene, and manifested a spirit of accommodation; declared his consent that his questions should be amended.' A long, tedious debate ensued. Several members expressed views which they failed to support, when it came

<sup>1</sup> Maclay, *Journal*, 131.

Senator Borah, Chairman of the Senate Committee on Foreign Relations in the Sixty-Ninth Congress, expressed to the writer the opinion that it was unfortunate that upon this historic occasion President Washington lost his temper, inasmuch as it prevented the establishment of a precedent — the very one which Washington, himself, wished to see established — for direct and frank conference between President and Senate at a stage in the making of a treaty when their face-to-face consideration and discussion of its provisions might be of most advantage.

<sup>2</sup> J. Q. Adams, *Memoirs*, VI, 427.



to a vote. Maclay says: 'A shamefacedness, or I know not what, flowing from the presence of the President, kept everybody silent.' The President made suggestion of slight changes in phraseology, which were agreed to. Finally, it was agreed to advise and consent to appropriate the twenty thousand dollars, if necessary, at the discretion of the President. 'This closed the business. The President of the United States withdrew, and the Senate adjourned.'

So ended this first attempt of the President of the United States to meet with the Senate as a council, to advise with them on the terms of a treaty. President Washington never cared to repeat the experiment, nor did any of his successors in person submit a treaty until a hundred and thirty years later, July 10, 1919, when President Wilson laid before the Senate the Treaty of Versailles, not as a project to be perfected, but as a finished treaty, awaiting only ratification.<sup>1</sup>

That unique conference between the President and the Senate had a surprising personal sequel for Senator Maclay. In the Saturday entry in his *Journal* he had written of his own temerity in halting the aye-and-no vote on the President's proposals, and of his having put the President 'into a violent fret' by urging that all the papers be referred to a committee, and he had pictured the President as trying to 'tread on the necks of the Senate.' But on Monday morning the President 'wore a different aspect.' Hardly had the Senate entered on its business, when Senator Maclay was summoned to the door, to speak to Colonel Humphreys, the President's *major domo*.

It was to invite me to dinner with the President, on Thursday next, at four o'clock. I really was surprised at the invitation. It will be my duty to go; however, I will draw no inferences whatever. I am convinced all the dinners he can now give, or ever could, will make no difference in my conduct. . . . It is a thing of course, and of no consequence; nor shall it have any with me.<sup>2</sup>

In this mood of conscious rectitude, of austere independence, not to say of stubborn offishness, Maclay attended this festivity. The hour was four o'clock in the afternoon! His *Journal* describes it thus:

The President and Mrs. Washington sat opposite each other in the middle of the table; the two secretaries, one at each end. It was a great dinner, the best of the kind I ever was at.

First was the soup; fish roasted and boiled; meats, gammon, fowls, etc. This was the dinner. The middle of the table was garnished in the

<sup>1</sup> Page 700.

<sup>2</sup> Maclay, *Journal*, 133.

usual tasty way, with small images, flowers (artificial), etc. The dessert was, first apple-pies, puddings, etc.; then iced creams, jellies, etc.; then water-melons, musk-melons, apples, peaches, nuts.

It was the most solemn dinner ever I sat at. Not a health drank; scarce a word said until the cloth was taken away. Then the President, filling a glass of wine, with great formality drank to the health of every individual by name round the table. (There were seventeen present.) Everybody imitated him, charged glasses, and such a buzz of 'health, sir,' and 'health, madam,' and 'thank you, sir,' and 'thank you, madam,' never had I heard before.<sup>1</sup>

#### THE PRESIDENT'S LATER PRACTICE IN COMMUNICATING TREATIES

Having learned something of the disposition of the Senate, President Washington thereafter made his communications regarding treaties in writing, and couched them in conciliatory language, often submitting complicated problems with a request for specific recommendations, even before entering upon negotiations with the other party to the proposed treaty.<sup>2</sup>

#### THE SENDING OF EXECUTIVE AGENTS ON DIPLOMATIC MISSIONS

The dispatch by the President of personal, unofficial representatives on delicate missions abroad dates from Washington's first administration.<sup>3</sup> February 14, 1791, the President informed the Senate that he had thus employed Mr. Gouverneur Morris, 'without giving him any definite character,' to confer with some of the leading states-

<sup>1</sup> Maclay, *Journal*, 137-38.

<sup>2</sup> The following examples illustrate the President's later method: Aug. 11, 1790. The President submitted to the Senate three questions in regard to relations with the Cherokees. (*Messages*, I, 79.) The Senate returned specific advice granting the President discretion between alternative proposals, and ending with a resolution that in case a different boundary line should be concluded, 'the Senate do advise and consent solemnly to ratify the same.'

Jan. 19, 1791. The President called the Senate's attention to the French Government's complaint in relation to an extra tonnage on their vessels, in order that by the Senate's advice he might be enabled to make such a reply 'as would best comport with the justice and interests of the United States.' (*Messages*, I, 9.) After considering the report of its special committee to which the matter was referred, the Senate passed a resolution advising that an answer be given to the Court of France, defending in the most friendly manner the Senate's suggested interpretation of the disputed treaty articles, in opposition to that urged by the French Government.

See also the President's messages of Sept. 17, 1789 (*Messages*, I, 61); Feb. 9, 1790 (I, 72); Aug. 4, 1790 (I, 76) and the communications relating to the plight of American captives in Algiers (I, 123; 182).

<sup>3</sup> In fact, the practice of employing secret or unofficial agents antedates the Constitution. For example, a number of such agents were appointed by the Committee of Secret Correspondence, created by the Continental Congress in 1775. Every President from Washington to the present has made use of such agents. This practice, covering more than a century and a half, has been the subject of exhaustive research by Henry M. Wriston, *Executive Agents in American Foreign Relations* (1929).

men of Great Britain upon matters then in controversy. After Mr. Morris, in seven or eight months of that service, had secured the desired information, and after he had been directed by the President to discontinue his conversations with the British officials, the President transmitted to the Senate the instructions which he had given to his personal envoy together with the report of his conferences with the British officials.<sup>1</sup> A few days later, he reported his having sent Colonel David Humphreys on a confidential mission to Madrid and to Lisbon.<sup>2</sup> Although in both these instances the President ultimately placed before the Senate the instructions under which the negotiations were carried on, and the results attained, his acts gave umbrage in the Senate. Maclay writes: 'The President sends first, and asks our advice and consent afterward.'<sup>3</sup>

#### THE RANK AND PAY OF REPRESENTATIVES OF THE UNITED STATES ABROAD

The Executive and the Senate were brought into interesting exchanges of views as to the diplomatic and consular services, especially as to the grades and salaries to be established. When the House bill providing for the means of intercourse between the United States and foreign nations reached the Senate, it was referred to a special committee which invited Jefferson, the Secretary of State, to a conference. Jefferson brought much highly spiced information as to the position and life of foreign ministers. 'He gave us a sentiment which seemed rather to savor of quaintness: "It is better to take the highest of the lowest than the lowest of the highest." Translation: "It is better to appoint a *chargé* with a handsome salary than a minister plenipotentiary with a small one."' <sup>4</sup> As a result of this conference, the Senate committee agreed to strike out the specific sum to be assigned to any foreign appointment; they recommended the appropriation of \$30,000 generally for the foreign service, leaving it to the President to account. The Senate passed the bill thus amended, but the House disagreed. This led the Senate into further debate of the matter, in which the Vice-President 'had a vast deal to say.' After repeated conference between the committees of the two branches of Congress, the bill was passed, increasing the annual appropriation to \$40,000, and fixing the maximum salary for each grade in the diplomatic service.<sup>5</sup>

<sup>1</sup> *Messages*, I, 96. Feb. 14, 1791.

<sup>2</sup> *Ibid.*, 97-98.

<sup>3</sup> *Journal*, 396.

<sup>4</sup> Maclay, *Journal*, 272.

<sup>5</sup> *Annals of Congress*, 992; Maclay, *Journal*, 304.



Maclay's comment on the outcome of this contest is representative of the attitude of the isolationists of his day:

The bill for appointing ambassadors had been referred to a committee of conference so long ago that I have forgotten it, but the thing was neither dead nor sleeping. It was only dressing and friends-making. The whole appropriation was \$40,000, and they were voted with an air of perfect indifference by the affirmants, although I consider the money as worse than thrown away, for I know of not a single thing that we have for a minister to do at a single court in Europe. Indeed, the less we have to do with them the better. Our business is to pay them what we owe, and the less political connection the better with any European power.<sup>1</sup> It was well spoken against. I voted against every part of it.<sup>2</sup>

## RELATIONS BETWEEN THE SENATE AND THE HOUSE

---

### FRAMING JOINT RULES TO GOVERN COMMUNICATIONS BETWEEN THEM

In the First Congress important precedents were set, not only as to the relations between the Senate and the President, but also as to the co-operation between the two branches of Congress.

The problem was a new one. For the Senate was not marked off by any distinction of rank or of property-holding such as differentiated the House of Lords from the House of Commons, or the council from

<sup>1</sup> Maclay's counterpart of 1935 would say: 'Our business is to see that they pay us what they owe us!'

<sup>2</sup> *Journal*, 304. A year earlier Maclay had summed up his ideal foreign policy for the United States thus: 'Neutrality, the point of profit, the grand desideratum for a wise nation among contending powers. Multiplied engagements and contradictory treaties go to prevent this blessing and invite a nation in foreign quarrels. China, geographically speaking, may be called the counterpart of our American world. Oh, that we could make her policy the political model of our conduct with respect to other nations — ready to dispose of her superfluities to all the world! She stands committed by no engagement to any foreign part of it; dealing with every comer, she seems to say, "We trade with you and you with us, while common interest sanctifies the connection; but, that dissolved, we know no other engagement."' *Ibid.*, 82, June 18, 1789.

Upon joining the committee on the bill for the salaries of ministers plenipotentiary and other representatives abroad, Maclay wrote: 'I bore my most pointed testimony against all this kind of gentry; declared I wished no political connection whatever with any other country whatever. Our commercial intercourse could be well regulated by consuls, who would cost us nothing. All my discourse availed nothing. The whole committee agreed with me they were unnecessary.' *Ibid.*, 257, May 6, 1790.



the assembly in the colonial legislatures, and to some degree in the new state legislatures. Furthermore, the Senate was 'federal in its origin.' In Congress, therefore, the problem was a constitutional one, to determine the basis of co-operation between the House, directly representative of the people of the several states, and the Senate, representative of the 'sovereign states' as such — an assembly of 'provincial notables,' holding a quasi-ambassadorial relation toward the legislatures to whom they owed their commissions. What procedure would best enable each of the two branches to carry on its functions — on the one hand, distinctive, and on the other, concurrent — assigned to it by the Constitution?

On the very day of its first organization, April 6, 1789, by vote of the Senate it was ordered that Mr. Ellsworth inform the House of Representatives that a quorum was now formed and that they were ready in the presence of the House to witness the ceremony of counting the electors' votes for President. In behalf of the House, the Speaker appeared and informed the Senate that the House was ready forthwith to participate in that ceremony. At the conclusion of the canvass of the vote, after the House had withdrawn, Mr. Madison returned to say that he was directed by the House to inform the Senate that the House had agreed that the notification of the election of President and Vice-President should be made by such persons and in such manner as the Senate should be pleased to direct.

The following day a committee was appointed by the Senate to 'prepare rules for the government of the two Houses in cases of conference and to take under consideration the manner of electing chaplains, and to confer thereon with a committee of the House of Representatives.'<sup>1</sup> The recommendations of this first joint committee having been agreed to, the Senate again took the initiative in the appointment of a committee of three to report 'a mode of communication to be observed between the Senate and the House of Representatives with respect to papers, bills, and messages, and to confer thereon with such committee as may be appointed by the House of Representatives for that purpose.'<sup>2</sup> The House at once chose its committee and a week later there was reported an elaborate procedure for the transmittal of a bill from one House to the other.<sup>3</sup> Its most striking feature was the series of four 'obeisances' which the

<sup>1</sup> *Annals of Congress*, I, 17-18. Later, almost incidentally, to this same committee was assigned the task of preparing the rules for governing the Senate's own procedure.

<sup>2</sup> *Ibid.*, 19.

<sup>3</sup> *Ibid.*, 20.

House members, charged with presenting a bill, should make after entering and before quitting the Senate Chamber.<sup>1</sup> During this ceremonial the Senators were to rise and remain standing. Any other House message than a bill might be brought by a single member, and the President of the Senate alone was to rise and acknowledge the obeisances and the receipt of the message. A similar procedure was to be followed in the House. In the Senate the report was recommitted and presently a less ceremonious procedure was reported, requiring simply that a message sent from one House to the other should be announced at the door by the doorkeeper and be respectfully communicated to the presiding officer by the person by whom it might be sent. It was further provided: 'Messages shall be sent by such persons as a sense of propriety in each House may determine to be proper.'<sup>2</sup>

This 'silly rule,' as Maclay called it, was under consideration in the Senate on the morning of the day assigned for President Washington's inauguration, when the Secretary of the House appeared at the door, where he was kept waiting while the Senate, with the citing of many a precedent as to procedure in Parliament and state legislatures, discussed his competence to communicate a message to the Senate and how such a communication should be received. But the situation could not wait for the Senate's decision, for presently it was announced that the Speaker and the House were at the door awaiting admission to attend the inauguration ceremonies. So amid great confusion the Senators left their seats as the Representatives crowded into the Chamber. Upon General Washington's arrival, he was escorted through the window to the balcony where he took the oath of office in the presence of the people, after which he returned to the Senate Chamber and made his inaugural address to the two branches of Congress there assembled.<sup>3</sup>

The next day the Senate resumed consideration of the joint committee's report. May 2, it was agreed in the Senate that until a permanent mode of communication between the two Houses should be adopted, the Senate 'will receive messages by the Clerk of the House of Representatives if the House shall think proper to send him; and papers sent from the House shall be delivered to the Secretary at the bar of the Senate and by him conveyed to the President.'<sup>4</sup> While

<sup>1</sup> *Annals of Congress*, I, 24.

<sup>2</sup> Agreed to by the House, April 28, 1789.

<sup>3</sup> For Maclay's account of the foregoing debate and of the inaugural address, see *Journal*, 8-10.

<sup>4</sup> *Annals of Congress*, I, 30.

this matter was under discussion the House took action which to some members of the Senate seemed an affront to the dignity of that body: The first bill to receive its third reading was sent to the Senate by the House in a letter. Maclay argued that if the Senate wished to show its resentment, it should return the bill by letter. He opposed a pending motion that it be sent by the Secretary of the Senate on the ground that it would interrupt the business by depriving the Senate of his service and urged that the Houses communicate by members, as he considered this 'the most cordial and friendly mode of intercourse.'<sup>1</sup> But the Senate decided that the Secretary should communicate the message to the other House.

Two months later the two Houses agreed upon simple joint rules relating to the procedure in the passing of bills and resolutions, and to their examination, after enrollment, by a joint committee of the two Houses, and determined that 'when the Senate and the House of Representatives shall judge it proper to make a joint address to the President, it shall be presented to him in his audience chamber by the President of the Senate in the presence of the Speaker, and both Houses.'<sup>2</sup> After a year's experience, on the recommendation of the joint committee appointed to consider what further regulations were necessary for conducting the business between the two Houses, supplementary rules were adopted, prescribing that when a bill, passed by the House, was rejected by the other, notice of such rejection should be given to the House which had approved, and that a bill thus rejected should not be brought in during the same session, without a notice of ten days and leave of two-thirds of that House in which it should be renewed. It was also provided that each House should transmit to the others the papers pertinent to any pending bill or resolution, and that after each House should have adhered to its disagreement, a bill or resolution should be lost.<sup>3</sup>

#### JOINT COMMITTEES

Joint committees were appointed not only for investigations and for ceremonial occasions but also for regular service. Thus Mr. Wingate was chosen 'a standing committee, jointly with a committee of the House, to examine and present to the President of the United States the enrolled bills that may pass the Senate and the House from time to time.' It seems to have been somewhat customary for the Senators and Representatives from a given state to meet in frequent

<sup>1</sup> *Journal*, 18-19.

<sup>2</sup> *Annals of Congress*, I, 57-58.

<sup>3</sup> *Ibid.*, 987.



delegation conferences, like that of March 8, 1790, described by Maclay, when 'the Pennsylvanians supped together at Simmons', and discussed Hamilton's proposal for the assumption of the state debts. As the first session approached its end, at the instance of the Senate trial was made of a sort of joint steering committee, 'to consider and report when it would be convenient and proper that an adjournment of the present session of Congress should take place; and to consider and report such business, now before Congress, necessary to be finished before the adjournment, and such as may be conveniently postponed to the next session.' <sup>1</sup>

#### THE STRUGGLE OVER PRECEDENCE IN DIGNITY AND IN PAY

In the First Congress many Senators showed a penchant for pomp and ceremonies in government. Not only were they sticklers for the granting of a ceremonious title to the President, but, led by the Vice-President, they showed an eagerness to assume for themselves in the *Journal* and in Senate debate the title of 'Right Honorable.' <sup>2</sup> Something of this same feeling became evident in the debate over the form of the enacting clause to be used in the first bill passed by Congress. It stood originally, 'Be it enacted by the Congress of the United States.' After lively debate this was amended in the Senate to read, 'Be it enacted by the Senate and Representatives of the United States of America in Congress assembled.' 'It was openly avowed by Mr. Izard that the dignity and pre-eminence of the Senate was the object aimed at by the amendment.' <sup>3</sup>

In the Senate debate on the compensation bill not a few favored the discrimination which would assign to Senators a higher scale of payment than to Representatives. Maclay moved that the pay of Senators be five dollars a day, the same as that proposed for Representatives. Only two Senators supported him, on this motion. His colleague, Robert Morris, moved that the pay of Senators should be eight dollars a day.

Up now rose Izard; said that the members of the Senate went to boarding-houses, lodged in holes and corners, associated with improper company, and conversed improperly, so as to lower their dignity and character; that the delegates from South Carolina used to have £600 per year, and could live like gentlemen, etc. Butler rose; said a great deal of stuff of the same kind; that a member of the Senate should not only have a handsome income, but should spend it all. He was happy enough to look down on these things; he could despise them, but it was

<sup>1</sup> *Annals of Congress*, I, 184.

<sup>2</sup> Maclay, *Journal*, 64-65.

<sup>3</sup> *Ibid.*, 16.



scandalous for a member of Congress to take any of his wages home; he should rather give it to the poor, etc. Mr. Morris likewise paid himself some compliments on his manner and conduct of life, his disregard for money, and the little respect he paid to the common opinions of people. . . . I answered Mr. Morris in a way that gave him a bone to chew, but I believe it is as well forgot.

To Maclay it seemed that the leaders in the debate took the attitude that 'all worth was wealth, and all dignity of character consisted in expensive living'; but he declared: 'Mr. Carrol, of Maryland, though the richest man in the Union, was not with them.'<sup>1</sup> The House would not tolerate the proposed discrimination, and six dollars was finally agreed upon as the daily compensation for members of both Houses.

#### SENATE INITIATIVE IN LEGISLATION

In law-making the letter of the Constitution's grant to the House of exclusive power to originate bills for the raising of revenue was respected, but the Senate soon began to place radical amendments upon financial measures, especially in the way of increasing appropriations.<sup>2</sup> In ordinary legislation from the first the Senate exercised its right to initiate bills.<sup>3</sup> Perhaps impressed by the judicial functions of the House of Lords, and by those of the councils in American colonial and state legislatures, as well as by the Constitution's assignment to the Senate of the trial of all impeachments, the Senate at once took the lead in originating measures relating to the judiciary. In the First Congress it initiated three important statutes in this field: establishing the judicial courts of the United States, regulating their procedure, and providing for the punishment of certain crimes against the United States. The Senate in the First Congress originated the act for the establishment of the temporary and permanent seat of government. It originated the procedure for the organization of new states and territories. It initiated the bill for incorporating the first Bank of the United States. This measure called forth heated debate, in which Maclay doughtily but in vain championed what he believed to be the interest of the public as against that of the speculators. The bill for the assumption of the state debts started in the House, but in the Senate it met strong opposition. Maclay

<sup>1</sup> Maclay, *Journal*, 134-36; 139-40.

<sup>2</sup> See Maclay's account of exciting debate over 'the Impost,' June 9, 1789, *Journal*, 71-73.

<sup>3</sup> Results of Lane W. Lancaster's painstaking research, 'The Initiative of the U.S. Senate in Legislation' (*The Southwestern Political and Social Science Quarterly*, June, 1928), have been drawn upon in this paragraph, and in a later section of this study.

instinctively distrusted any proposal which came from Hamilton — 'What a damnable villain!' — and inveighed against the selfish advantage which would be gained for security-holders, many of whom, as he well knew, were numbered among the Senators who advocated and voted for the bill.<sup>1</sup>

#### THE DAY'S WORK

The daily sessions in the First Congress were often far from strenuous.

The minutes were read. A message was received from the President of the United States. A report was handed to the chair. We looked and laughed at each other for half an hour, and adjourned. (April 3, 1790.)

We used to stay in the Senate Chamber until about two o'clock, whether we did anything or not, by way of keeping up the appearance of business. But even this we seem to be got over. (April 26, 1790.)<sup>2</sup>

Frequently the Senate adjourned early and its members went over to the House to listen to debate on the bills which were there taking shape. The pioneer work on financial measures and on the bills for creating the several departments, for example, started in the House, and there engrossed the attention of Senators as well as of the public. The fact that the Senate sessions were held in secret doubtless conduced to a more expeditious dispatch of business than was possible in the House, where more than three times as many members carried on their debates not unmindful of the throng of listening visitors. But the Senate's power as a revisory body soon came to be recognized and political strategists formed their plans accordingly. The Senate had been in existence only a month when Maclay noted: 'The moment a party finds a measure lost, or likely to be lost, all engines are set to work in the Upper House.' He declared that the House bill on naturalization was 'a vile bill, illiberal and void of philanthropy and needed mending much.' But when he complained to the Pennsylvania Representatives that such an ungenerous bill should have been sent up to the Senate, 'they answered, "You have little to do," and they sent us employment.'<sup>3</sup> But by the free use of its amending power in correcting the mistakes and removing the crudities of

<sup>1</sup> In his introduction to the 1927 edition of Maclay's *Journal*, Charles A. Beard states: 'Of the 26 Senators who composed the upper house as fully organized, at least 16 were security-holders; of the 14 who voted for assumption, 10 were security-holders. . . . Like the owners outside of Congress, probably a majority of them were *bona fide* public creditors, but beyond question a number of them were feverish speculators, enriching themselves while redeeming the faith of the Republic.'

<sup>2</sup> Maclay, *Journal*, 184, 224, 242.

<sup>3</sup> *Ibid.*, 208.

House bills, as well as in the introduction of new matter, the Senate soon began to increase its usefulness in legislation far beyond what the framers of the Constitution had foreseen or intended.

Two years mark but a brief chapter in the history of our constitutional development. But in the term of that First Congress an acutely conscientious President and a Senate representative of the most diverse theories of government had gone far in establishing lasting precedents. Before its final adjournment was reached, the twilight zone in which lie the Senate's so-called executive powers had been rather thoroughly explored and tentatively charted. The Senate had given up its preference for the oral communication of nominations, and had shifted from balloting to *viva-voce* voting upon them. The President had been treated to the first sample of 'senatorial courtesy,' in the rejection of an admirable appointment through factious opposition led by Senators from the state concerned. Both the House and the Senate had given 'practical construction' to the Constitution as vesting in the President an unrestricted power of removal. After one bitter experience, the President had abandoned his preference for direct personal conference with the Senate as to treaties, but he continued to make frequent requests for the Senate's counsel on complicated problems before conventions or treaties assumed final form, and in some cases even before negotiations were begun.

Agreement had been reached as to the mode of communication between the two Houses and the main points of procedure as to committees of conference had been determined. The Senate unchallenged had initiated important measures and by its amending power had radically modified many bills which it could not originate. Although the secrecy of the Senate's sessions prevented its acquiring prestige with the public, 'before the first session was over it had manifested in its relations with the House those superiorities of address and management which have since been its recognized characteristics.'<sup>1</sup>

<sup>1</sup> Henry J. Ford, *Rise and Growth of American Politics*, 258.

#### MACLAY'S FAREWELL TO THE SENATE

Maclay left a characteristic account of the proceedings of the Senate on the last day of the First Congress, March 3, 1791.

At the morning session, 'it was patching, piecing, altering and amending, and even



## REFERENCES

- The Journal of William Maclay*, edited by Edgar S. Maclay (1890). With Introduction by Charles A. Beard (1927).  
*Life and Writings of John Adams*.  
*Memoirs of John Quincy Adams*.  
 Collected writings of Washington, Hamilton, Jay, Jefferson, Madison, Ellsworth, Sherman, Wilson.  
 Louis C. Hatch and Earle L. Shoup. *History of the Vice-Presidency of the United States*.  
 Marshall, John. *Life of George Washington*.  
 Hayden, Ralston. *The Senate and Treaties, 1789-1817*.  
 Lancaster, Lane C. 'The Initiative of the Senate in Legislation,' in *South-western Political and Social Science Quarterly*, June, 1928.  
 Bancroft, George. *History of the United States*.  
 Channing, Edward. *History of the United States*.  
 McMaster, John B. *History of the People of the United States*.

(The present writer presented a paper upon the subject of this chapter at a session of the American Political Science Association in Washington, December 30, 1920.)

originating new business. It was, however, only for Ellsworth, King, or some of Hamilton's people to rise, and the thing was generally done. . . .

'In the evening by candlelight. . . . There was now such confusion . . . that I confess that I lost their arrangement. Indeed, I am apt to believe if they had any they lost it themselves. They all agreed at last that the business was done. The President left the chair and the members scampered down stairs. . . . As I left the Hall, I gave it a look with that kind of satisfaction which a man feels on leaving a place where he has been ill at ease, being fully satisfied that many a culprit has served two years at the wheelbarrow without feeling half the pain and mortification that I experienced in my honorable station.' (*Journal*, 411-13.)

In view of the veneration in which later generations have held the *Federalist*, Maclay's personal opinion of it is of interest. June 14, 1789, he wrote in his *Journal*: '*Memorandum*: Get, if I can, the *Federalist* without buying it. It is not worth it. But, being a lost book, Izard, or some one else, will give it to me. It certainly was instrumental in procuring the adoption of the Constitution. This is merely a point of curiosity and amusement to see how wide of its explanations and conjectures the stream of business has taken its course.'

It is to be noted that this was written less than two months after Washington's first inauguration!

Throughout this Congress Maclay had been the most consistently outspoken Anti-Federalist. The stubbornness with which he opposed the chartering of the Bank of the United States cost him his re-election. He was succeeded by an ardent Federalist, James Ross, after Gallatin's election had been set aside.



# III

---

ELECTION OF SENATORS BY STATE LEGISLATURES

---



Through the medium of the state legislatures — which are select bodies of men, and which are to appoint the members of the national Senate — there is reason to expect that this branch will generally be composed with peculiar care and judgment.

ALEXANDER HAMILTON (1788)


Let it be remembered that the Senate is to be created by the sovereignties of the several states; that is, by the persons whom the people of each state shall judge to be the most worthy, and who, surely, will be religiously attentive to making a selection in which the interest and honor of their state will be so deeply concerned.

JOHN DICKINSON (1788)

Never in this world has any institution of government wrought out more successful results than the provision of the American Constitution for the selection of Senators of the United States.

SENATOR ELIHU ROOT (1911)

---



---

## ELECTION OF SENATORS BY STATE LEGISLATURES

---

### STATE REGULATION OF SENATORIAL ELECTIONS

---

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof. The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators.<sup>1</sup>

FOR more than seventy-five years Congress was content to possess this power without assuming its exercise. Meantime the states regulated senatorial elections to suit themselves. In the early years the choice was usually made by concurrent vote of the two houses, sitting separately. Later about half the states came to require that the election be made by a vote in joint convention, though the weight of constitutional authority seems to have been against this practice, on the ground that, in prescribing that Senators should be chosen 'by the Legislature,' it was the Constitution's intent that that body should perform this function 'legislatively,' as it passed any ordinary bill, i.e., by concurrent vote.<sup>2</sup> Yet insistence upon a majority vote for the same candidate in both branches of the legislature led not infrequently to deadlocks, resulting in vacancies in the

<sup>1</sup> In reply to a question in the Virginia ratifying convention Madison explained that this sole limitation on the power of Congress to regulate elections — 'except as to the places of choosing Senators' — was made because Congress might otherwise cause great inconvenience by compelling the state legislature to elect Senators in a different place from that of the ordinary sessions. Constitution, art. I, sec. 3, par. 1; sec. 4, par. 1.

<sup>2</sup> Story, *Commentaries on the Constitution*, secs. 705-08; Kent, *Commentaries*, part 2, lect. XI, 225-26.

Senate; it also presented a constant temptation to sharp practice for partisan advantage, and gave rise to election contests very embarrassing for the Senate to decide, since the point at issue was what constituted a legal 'house' or 'senate' in the state legislature.<sup>1</sup> With a view to removing such tangles bills for the regulation of senatorial elections had been twice introduced in the Senate before 1860, but neither was brought to debate. For the next five years Congress was too much engrossed by war legislation to give attention to this proposed change.

Peace was hardly restored when the Senate was again thrown into turmoil by the Stockton contest. The election of J. P. Stockton of New Jersey was challenged on the ground that the joint assembly which 'elected' him had exceeded its power in declaring — after weeks of deadlock, due to the fact that the New Jersey law required for election 'a majority of the votes of the members elected to both houses of the legislature' — that 'any candidate receiving a plurality of votes of the members present shall be declared elected.' By a vote of 22 to 21 — Stockton, himself, voting — the Senate sustained its committee's report that, for the purpose of electing Senators the joint assembly was the legislature, and hence had the power to lay down this plurality rule. Three days later, however, this action was reconsidered: the Senate decided that Stockton's vote should not be received in determining the question of his own election, and upon the next vote he was unseated.<sup>2</sup> This typical case — suggestive of the host of perplexing questions likely to arise as long as no uniform regulation of the manner of senatorial elections was provided, and sure to be decided in the Senate only after many heartburnings and anxious forecasts of party advantage — seems to have exhausted the patience of the Senate, for it forthwith instructed its Committee on the Judiciary to inquire into the expediency of providing a uniform and effective mode of securing the election of Senators, by the legislatures.<sup>3</sup>

<sup>1</sup> For typical illustrations of these embarrassments, see George H. Haynes, *The Election of Senators*, 20-22. Of especial significance is the Indiana contest of 1857.

<sup>2</sup> G. S. Taft, *Compilation of Senate Election Cases*.

W. P. Fessenden, *Congressional Globe*, 1567; March 22, 1866.

G. H. Haynes, *op. cit.*, 23; James A. Woodburn, *The American Republic*, 215.

<sup>3</sup> James G. Blaine declared the resulting law to be 'the direct fruit of the Stockton case,' and emphasized it as symptomatic of the new attitude brought by the war, that 'everything which may be done by either nation or state may be better and more securely done by the nation. The change was important and led to far-reaching consequences.' *Twenty Years in Congress*, II, 160.



CONGRESSIONAL REGULATION OF SENATORIAL ELECTIONS

---

July 9, 1866, the committee reported its bill. The only vigorous opposition to the principle of the measure came from Senator Saulsbury of Delaware, who denounced it as a deplorable interference by the Federal Government in state affairs, where no inconvenience in the past had called for such regulation.

Sharp differences of opinion arose over three matters of detail. Should the voting be *viva voce* or by secret ballot? Objections were raised to the *viva-voce* vote on the ground that Senators, fearing party discipline, would act against their conscientious convictions; and that this was an unnecessary insistence upon uniformity which would be especially objectionable to the states which had abandoned the open vote. On the other hand, it was argued that the *viva-voce* vote was in use in many states. Daniel Clark and Charles Sumner stressed the point that in voting for Senator the member of a state legislature was acting in a representative capacity, and it was, therefore, the right of the constituents to know how he voted. These considerations prevailed and the open vote was retained.<sup>1</sup>

Should the election be by concurrent or by joint vote? Both Story and Kent had insisted that the Constitution's provision called for a vote by the two houses acting in their separate and organized capacities, each having the ordinary constitutional right of negative on the other's proceedings. But the framers of this law felt that experience had amply proved the necessity of resort to a joint vote to ensure an election. As a concession, it is said, to the predilections of New York and the New England states, a compromise was agreed upon, whereby the first vote should be taken by the two houses separately, with recourse to a joint convention if the concurrent vote failed to elect. As John Sherman and other shrewd observers predicted, this compromise proved to be the source of much trouble.

<sup>1</sup> For a severe condemnation of this law's 'pernicious enforcement of *viva-voce* voting, most favorable to party pressure and bribery,' see W. P. Garrison, in *New York Nation* (Jan. 21, 1892), 44.

Not only was there no material advantage in attempting an election first by concurrent vote, since all other voting was to be done in joint assembly, but on the other hand there was the great disadvantage that, by disclosing the preference of each member and the difference between the two houses, it would show at the very outset how easy it might be for a small minority to prevent, if it could not control, the election.<sup>1</sup>

To what extent should the senatorial election be allowed to delay the legislature's ordinary work? As originally reported, the bill had provided that the joint assembly should continue to vote for Senator, without interruption by other business, until a Senator should be elected. Against this, Senator Sherman took the lead in vigorous protest, insisting that, with this power to block all legislation at its command, a small factional minority would hold out till it forced the majority to yield to its demands. On the other hand, Senator Clark declared that 'not once in a hundred years' would any third party thus stand out and block the ordinary legislation of the state. Another asserted his hearty belief in stopping the wheels of state legislation till 'the infinitely higher duty' of electing United States Senator had been performed, nor did he think depriving the state, in the interim, of its power to make its own laws was a disproportionate penalty. But more practical counsels prevailed, so that but a single ballot in joint assembly was required on each legislative day.

The bill was further criticized because it did not allow election by plurality — in its results, probably the law's most serious defect; and because, by virtue of the differing terms of state legislatures, in some states they would be compelled to elect Senators fifteen or eighteen months before vacancies were to occur. But no change was made to meet these objections.

In the Senate the discussion of this important measure occupied but a single day, and it was passed by a vote of 25 to 11, 13 being absent. In the House, though efforts were made to block it, under the operation of the previous question it was passed without a word

<sup>1</sup> Thus, Jan. 17, 1905, in the Missouri legislature, T. K. Niedringhaus received a majority of eight of the total number of votes cast in the two houses separately, but did not secure a majority in the Senate. The next day, therefore, the election was thrown into the joint assembly. In the sixty days of the ensuing deadlock he could not secure a majority. After the vote of Jan. 17, President Roosevelt telegraphed congratulations upon his *election* — which never took place! G. H. Haynes, *op. cit.*, 33-34.

of debate.<sup>1</sup> It became a law July 25, 1866, more than half a century after Congress had first received a proposition for the regulation of senatorial elections. Despite the fact that its defects became more and more obvious, it remained unchanged till by the ratification of the Seventeenth Amendment (1913) legislative election was superseded by the election of Senators by direct vote of the people.<sup>2</sup>

In brief, the provisions of this act were as follows: On the second Tuesday after the organization of a legislature when a Senator from that state is to be elected, the two houses shall meet separately, and by a *viva-voce* vote name a person for Senator. On the following day, the two houses shall meet in joint assembly, and the results of the voting shall be canvassed. If each house has given a majority vote to the same candidate, he shall be declared elected; if not, 'the joint assembly shall meet at twelve o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a Senator shall be elected.'

#### EXPERIENCE WITH LEGISLATIVE ELECTION OF SENATORS

---

For a century and a quarter the members of the United States Senate were elected by state legislatures. That the Senate attained its highest prestige while its members were thus chosen indicates that the Constitution framers' choice of method was not without

---

<sup>1</sup> Passed the Senate, July 11 (*Cong. Globe*, 3734). Passed the House July 23 (*ibid.*, 4063). The text of the law is in 14 *U.S. Statutes at Large*, 243-44.

<sup>2</sup> Its ratification was proclaimed under date of May 31, 1913. For changes which were proposed, see G. H. Haynes, *op. cit.*, 30. After the enactment of this law of 1866, both by custom and even by statute law state restrictions continued to be applied. Thus it is said that for a century after Vermont became a state never once was the custom violated which required that one Senator should have resided on the east and one on the west side of the Green Mountains. As early as 1809 Maryland sought to bind her legislatures in choice of Senators by a statutory requirement: 'One of the Senators shall always be an inhabitant of the eastern shore and one of the western shore' — a statute which stood on the books for more than eighty years, though once repealed only to be promptly re-enacted, and once frankly set at defiance. The results of restrictions could hardly fail to be both absurd and injurious, and the constitutionality of such a law is open to question. See G. S. Taft, *Senate Election Cases* (1903), cases of Lyman Trumbull (1855) and C. J. Faulkner (1888). For comment on Vermont and Maryland elections, see J. H. Flagg, 'The Choice of United States Senators,' *New England Magazine*, XIV, 190-94.



strong elements of justification. Moreover, it is to be acknowledged that some of the worst abuses which came to be associated with senatorial elections might have been corrected without taking the election from the legislatures, and that experience in recent years has proved that in practice the election of Senators by direct vote of the people yields some results which are far from ideal. These points are to be borne in mind, in approaching a consideration of some unsatisfactory workings of legislative election which contributed in large measure to the demand for popular election culminating in the ratification of the Seventeenth Amendment.<sup>1</sup>

#### DEADLOCKS

In the First Congress for several months New York was without representation in the Senate for the reason that no election could be effected by the concurrent votes of the two branches of her legislature, as long as they were controlled by hostile factions.<sup>2</sup> Thus Senate history opened with a typical 'deadlock' — a term used to denote a contest in a legislative election so stubborn and prolonged that its issue could only be either the prevention of an election or the choice of a Senator, not because of his fitness for that high office, but because he seemed the most available compromise candidate upon whom the disappointed and hostile factions could be brought to unite. To prevent deadlocks was one of the alleged objects of the law of 1866, but there can be no question that, by its requirement of a telltale concurrent vote at the start, and of election by majority instead of by plurality, it served to multiply these contests. The record of senatorial elections for the fifteen years, 1891 to 1905, shows forty-five such deadlocks — from one to seven in each of twenty states. Nor was it a sectional disorder, for their distribution was country-wide, from Delaware to California and from North Dakota to Louisiana. The number of calendar days from the concurrent vote to the final joint ballot ranged from seven to 114, and the number of ballots from six to 217.<sup>3</sup>

But statistics such as these give but a hint of the stubbornness and

<sup>1</sup> Most of the illustrations in the following discussion of these aspects of legislative election of Senators are taken from the author's *The Election of Senators* (1906), which presents a detailed study of the record of senatorial elections for the years 1891 to 1905 inclusive.

<sup>2</sup> J. B. McMaster, 'The Political Depravity of the Fathers,' *Atlantic Monthly*, LXV, 628-29.

<sup>3</sup> Haynes, *op. cit.*, 36-40.



acrimony of many of these contests. They take no account of the extent to which the whole situation was often dominated by the party caucus, a body unknown to the law, meeting behind closed doors, its proceedings known to the public only through unauthoritative reports which leaked into the newspapers. The first vote in a senatorial election had to be taken 'on the second Tuesday after the meeting and organization of the legislature'—i.e., from eight to thirteen days had to elapse from the convening of the legislature before the first formal step in the election could take place. During this period the members, assembled at the capitol, were open to various forms of persuasion from the managers of the several candidates. Thus in 1898 Hanna was elected on the first joint ballot of the Ohio legislature, but in the campaign for members of that legislature the approaching senatorial election had overshadowed every other issue, and at the capitol, in the days preceding the election, excitement reached the highest pitch, and charges of bribery were rife. Even where the legislative journal did disclose a deadlock, often the daily balloting amounted only to stage-play until the real fight in the caucus behind the scenes had determined the plan of battle and virtually decided who the victor was to be. The legislative journal in Florida, 1891, shows that the election was not effected till thirty-five days after the legislature began to ballot; it does not reveal the significant facts that at an early session the Democratic caucus had unanimously adopted a resolution that a committee should so divide the vote as to *prevent* an election until the joint caucus should make a nomination;<sup>1</sup> that after eighty-six futile ballots the caucus renounced its task as hopeless, and that the very next day, freed from this restraint, the legislature elected Call. In 1903 a Senator was elected by the North Carolina legislature on the ninth ballot, but not until caucus action had focused the vote. On the first ballot in the legislature the Democrats had scattered their votes among eighty-five candidates, and, after the deadlock had continued for a week, seventy-eight candidates were still voted for in a single balloting. The night following the vote last mentioned, upon

<sup>1</sup> This practice was in vogue nearly up to the time of the ratification of the Seventeenth Amendment. Jan. 14, 1910, the Mississippi Democratic caucus, before the first step had been taken by the legislature, adopted the following resolution: 'We pledge ourselves individually and collectively that no election of Senator shall occur in the two houses or in joint convention until a nomination is made by this caucus, and, if no nomination is made by this caucus before the time voting begins, we will so distribute our votes in either house or in joint convention as to prevent any one candidate receiving a majority.' *Boston Herald*, Jan. 15, 1910.

the sixty-first ballot in caucus Overman secured a majority. The next day his was the only name placed in nomination, and he was forthwith elected by a majority of nearly seven to one — a performance which in fact amounted to nothing but a ceremonious announcement of the victory just won behind the scenes. In Louisiana, 1902, after balloting in joint assembly had been going on for more than a month, a Democratic caucus decided to postpone the election of Senator till the next year. As required by the law of 1866, they kept up the farce of convening the joint assembly at noon of each legislative day to 'take at least one vote.' On the final ballot of the session not less than thirty candidates received the doubtful compliment of a vote — one being cast for 'Grover Cleveland'!<sup>1</sup>

#### STAMPEDED ELECTIONS

Stampeded senatorial elections became of frequent occurrence. The statement that in the thirty-two-day deadlock in Oregon, 1893,<sup>2</sup> fifty-eight ballots were taken might give the impression of leisurely voting and of final choice reached with a careful weighing of the qualifications of possible candidates. In fact, however, the man who was elected on the fifty-eighth ballot by a majority of one had not even been nominated until just fifteen minutes before the hour when the legislature's term must expire. On the last day of Montana legislature's session in 1901 the clock in the hall of the assembly still testified that it was not yet midnight; but it was 3.30 A.M. before the legislature could be stampeded into electing a man whose possible candidacy up to that moment had hardly been given a serious thought. The distribution of ballots through the session is suggestive. In this Montana election, of the sixty-six ballots twenty-two were taken on the final day of the session, and in the same year twenty-five out of fifty-three were taken on the Oregon legislature's last day. In the first year of the decade run of farce which the Delaware legislature played under the management of J. Edward Addicks, toward the end of the session the balloting waxed fast and furious: on a single day

<sup>1</sup> Illustrations of caucus domination might easily be multiplied. Among the most notable was Turley's election on the seventh ballot of the Tennessee legislature, 1898, but not till his nomination had been won on the 145th ballot in the caucus. (See Haynes, *op. cit.*, 40-43, for elections in Kentucky, 1890; Alabama, 1891, and Florida, 1897.) In 1905, Brandegee was nominated in the Republican caucus of the Connecticut legislature at 2 A.M., on the 36th ballot, after the ordeal of balloting had continued without interruption for twelve hours.

<sup>2</sup> On two other occasions — 1901 and 1903 — Oregon Senators were chosen in the closing hour of the session. Many similar stampedes in other states might be cited.

forty-two ballots were taken, and on the next day thirty-seven, the last of them but a few minutes before the final adjournment; but in vain, for no election was effected.

A significant feature of elections under such conditions was the astonishing multiplication of candidates. The record was probably established by North Carolina's eighty-five candidates in 1903, but other states have made notable showings. On the first ballot in Mississippi, 1896, thirty-four candidates received votes; in the elections of 1899, twenty-one men were voted for in Montana, sixteen in Nebraska, seventeen in Pennsylvania, and twenty in Utah, while in the mad hunt for some name by which the Delaware legislature might be stampeded not less than twenty-seven candidates were tried out. That any one state should have twenty, not to say eighty-five candidates of first-rate or even of third-rate senatorial timber is sufficiently improbable. The election of Senators by state legislatures became so much of a game of chance that often even the darkest of dark horses were brought into the running.

In such contests, involving the most intense personal and party interests, contestants could not face the prospect of defeat or of a drawn game with the calmness of opponents at chess. The stake was too large. As the inevitable hour of adjournment drew near, tactics were changed. Often resort was had to parliamentary sharp practice. Thus, in the Pennsylvania election of 1890, when it was rumored that by breaking pairs the deadlock was to be ended in favor of Quay, the Democrats and independents countered by joining to prevent the presence of a quorum: for twenty-eight days they made it impossible for the joint assembly to take a vote. In Delaware, 1895, the president of the senate, who from the day when he assumed the functions of the chief executive had taken no part in the senate's proceedings, on the last day of the session was induced to assert his right both to preside and to vote, and thus blocked the election.<sup>1</sup> Two years later, in the same state, a 'rump' house organized and declared Addicks elected.

Or the growing tenseness of strain might evidence itself not in parliamentary strategy but in rioting more naturally associated with a prize-fight than with a senatorial election. Hamilton had prophesied

<sup>1</sup> In the following four cases it was the contestant's claim that the election should be declared invalid because of the autocratic if not illegal action of the presiding officer in the joint assembly when the decisive ballot was taken: David Turpie, Ind., 1887, *Senate Election Cases*, 719-21; John Martin, Kan., 1893, *ibid.*, 812-74; Henry A. du Pont, Del., 1895, *ibid.*, 818-74; Isaac Stephenson, Wis., 1909, *ibid.*, 1114-55.



that since the state legislatures were themselves 'select bodies of men' their choice of Senators would generally be made 'with peculiar care and judgment,'<sup>1</sup> and Dickinson reasoned that the Senate was to be created

by persons whom the people of each state shall judge to be the most worthy, and who, surely, will be religiously attentive to making a selection in which the interest and the honor of their State will be so deeply concerned.'<sup>2</sup>

What would those worthies have thought, had they witnessed some of the legislative elections of a century later!

On the 25th ballot the result was first announced as a tie. Pandemonium prevailed for a time, the partisans of both candidates jumping upon chairs and waving their arms frantically in efforts to make themselves heard. (Florida, 1897.)

For two hours the assembly was tossed and swayed by the storm of excitement, and the final scene, ending in the announcement of Rawlins's election, was one of such wild frenzy, such dramatic, almost tragic, features, as to almost beggar description. (Utah, 1897.)

Lest the hour of adjournment should come before an election was secured, an attempt was made to stop the clock upon the wall of the assembly chamber. Democrats tried to prevent its being tampered with; and when certain Republicans brought forward a ladder, it was seized and thrown out of the window. A fist-fight followed, in which many were involved. Desks were torn from the floor and a fusillade of books began. The glass of the clock front was broken, but the pendulum still persisted in swinging until, in the midst of a yelling mob, one member began throwing ink bottles at the clock, and finally succeeded in breaking the pendulum. On a motion to adjourn, arose the wildest disorder. The presiding officers of both houses mounted the speaker's desk, and, by shouting and waving their arms, tried to quiet the mob. Finally, they succeeded in securing some semblance of order. (Missouri, 1905.)<sup>3</sup>

Passions stirred by these deadlocked elections led not only to rioting but to threats of organized attack and resistance. In Colorado, 1903, the two houses were controlled by different parties, with the result that the majority in each, on the charge of fraudulent elections, tried to unseat enough of the members to secure for its party the control of the joint assembly. The Democrats had at their back the police of Denver, while the Republicans appealed to the Governor for troops,

<sup>1</sup> *Federalist*, No. 27.

<sup>2</sup> John Dickinson, 'Letters of Fabius,' No. 11, in the *Federalist and Other Constitutional Papers* (edited by E. H. Scott), II, 784.

<sup>3</sup> Haynes, *op. cit.*, 47-50.



and for a time chaos and bloodshed seemed inevitable. In Kentucky, 1896, threats and assaults became so frequent that the Governor felt forced to call out the militia, and for three days the legislature met in a capital filled with troops enforcing martial law. According to the press reports, most of the members attended sessions heavily armed, and leaders of each party were posted at vantage-points in the hall, deputed to open fire instantly 'in case of a signal for close action.' In the joint ballot on one of these days only one of the one hundred and thirty-two members voted, and on the final roll-call but three answered to their names. The motion that the session be dissolved 'everlastingly, eternally and forever' was 'carried with a wild yell. A member started up the Doxology, and the crowd in the lobby joined in.'<sup>1</sup> After this manner did the legislators of one state, in fulfillment of Dickinson's prophecy, 'show themselves religiously attentive to making a selection' of their Senator! But no selection was made!

#### BRIBERY AND CORRUPTION

How often resort has been had to bribery and corruption in connection with senatorial elections it is impossible to determine, but there is indisputable evidence that a number of legislatures were thus tainted in the interest of certain candidates, and that this evil was not lessened but greatly increased after — if not because of — the enactment of the law of 1866. For it is a significant fact that up to that date only once — in 1857, seventy years after the framing of the Constitution — had the Senate been called upon to investigate an election the validity of which was challenged because of alleged bribery, while in the next thirty-five years nine such cases were brought to the bar of the Senate. The causes of this increase, the results of the investigations, and the Senate's precedents and procedure in handling them are discussed elsewhere. The only point to be noted here is that the increase of the evil was one of the causes of the unrest and of the popular belief, however unsubstantial may have been its foundation, that legislative election was at the root of this noxious growth.

#### VACANCIES

To assure to each state its 'equal suffrage in the Senate' was one of the objects most earnestly sought by the framers of the Constitu-

<sup>1</sup> See press reports from *Louisville Courier-Journal* and *New York Tribune*. Haynes, *op. cit.*, 50, n. 4, and 203, n. 32.

tion. It was soon found that the law of 1866 tended to defeat that object. Between 1891 and 1905 the hour of adjournment found legislatures still in deadlock which left fourteen seats vacant in the Senate.<sup>1</sup> One of these legislatures, at its next session, had an opportunity to elect a Senator before the new Congress was convened. In all the other cases the states were faced by gloomy alternatives. To be sure, five attempted to solve the dilemma by recess appointments made by the Governor; but, following the unbroken precedent of three-quarters of a century, the Senate refused to admit men thus presenting themselves with governors' appointments to fill vacancies which had been caused by unbroken deadlocks.<sup>2</sup> Three of the states chose the alternative of a special session, an expensive and unreliable luxury.<sup>3</sup> Six states accepted, as a penalty for their legislatures' failure to act, vacancies in the Senate, most of which lasted nearly to the end of the ensuing Congress. In the decade, 1895 to 1905, there were but two Congresses in which Delaware had her 'equal suffrage' in the Senate; in the Fifty-Seventh Congress she had no part whatever in the Senate's deliberations.

#### MISREPRESENTATION

Factional strife has caused the election of minority candidates under other methods, but the chances of such minority successes were vastly increased by the opportunities opened up by a prolonged deadlock in the legislature. Thus in 1893 North Dakota, a Republican state with a Republican legislature, sent a Democrat to the Senate, while Kansas elected a Democrat, though the legislature contained only a 'handful' of Democrats.<sup>4</sup>

In some states antiquated systems of representation in their own legislatures have caused the legislatures' election of Senators to give far different results from those which would have been yielded by popular elections. Thus in the forty years, 1865 to 1905, Democrats in Connecticut held the governorship thirteen years, and in four presidential elections they carried the state; but in all that period they elected but one Senator, and he was sent to Washington for but three years to fill a vacancy.

<sup>1</sup> California, 1899; Delaware, 1895, 1899, two in 1901, 1905; Kentucky, 1896; Louisiana, 1892; Montana, 1893; Oregon, 1897; Pennsylvania, 1899; Utah, 1899; Washington, 1893; Wyoming, 1893.

<sup>2</sup> Haynes, *op. cit.*, 61.

<sup>3</sup> In California the daily cost merely for members' salaries was \$960. In the Kentucky special session a new deadlock promptly developed which lasted over a month.

<sup>4</sup> In both these states party lines were badly blurred. Haynes, *op. cit.*, 64, n. 7.

In some states the misrepresentation consisted in the election of corruptionists<sup>1</sup> or of the representatives of great financial interests<sup>2</sup> who — it was believed — would have had little chance of success in a campaign for the people's votes. Sometimes the senatorship was meekly handed over to a state boss, whose phenomenal skill in the manipulation of legislators was out of all proportion to his hold upon the voters.

On January 14 (1897), the Republican members of the Legislature of New York met in caucus and selected their candidate to succeed Mr. D. B. Hill. The most eminently qualified man in the State of New York (the Hon. Joseph H. Choate) was duly presented to the caucus. No other names were presented or mentioned. There are 151 Republican members of the present state legislature. A vote was taken, and seven members were found to be in favor of Mr. Choate. All the rest, with a notable exhibition of spontaneity, declared themselves in favor of Thomas C. Platt. A few days later Mr. Platt was formally elected. His control of the legislature is more complete than his control of any office boy in his private employ; for the office boy, after all, is not owned by Mr. Platt, and could quit work if he did not find that the place suited him, but the legislature seems to be his, both soul and body.<sup>3</sup>

#### INTERFERENCE WITH THE LEGISLATURE'S SERVICE OF THE STATE

There never was a prolonged contest over a legislative election which did not do serious harm to the state's interests which its law-makers were chosen to guard. Each ballot took a considerable amount of time, and when sessions were limited to forty or sixty days, incessant balloting could not fail to curtail very materially the time available for the legislator's normal work in the service of the state. The cynic may query as to what 'normal work' they would otherwise have done, and whether there has been 'any legitimate hunger for more state legislation than we have.' But it must be recognized that, as the session wore on, the animosities engendered in the deadlock projected themselves into the ordinary work of the legislature, giving a party color to the most non-partisan measures, and distorting the legislator's views upon many state issues.

<sup>1</sup> The case of Lorimer (Ill., 1909) may be mentioned, but it is to be recalled that he had been sent to the House by popular election. Such corruptionists as Addicks and W. A. Clark could probably have secured Senate seats by popular election. The cases of Stephenson and Newberry deserve attention (pp. 127 ff.).

<sup>2</sup> In popular opinion Henry B. Payne of Ohio was of this class. Haynes, *op. cit.*, 58-59. For other 'possibilities,' *ibid.*, 95-96.

<sup>3</sup> *Review of Reviews*, Feb., 1897. Henry Loomis Nelson, *American Political Science Review* (May, 1907), 484, declares, 'The man who is chosen Senator is the candidate of the boss, or he is the boss himself.' As bosses, Platt, Quay, Penrose, and Hanna took seats in the Senate.



The most impressive warning of what such contests might mean for a state was afforded by the experience of Oregon in 1897. Its constitution required the presence of two-thirds of the members elected to each house, before that house could organize.

Forecasting the probable result of a ballot in joint assembly, a sufficient number of the members of the lower house absented themselves to prevent its completing its organization. Early in the session, a perfunctory attempt was made each morning to convene the house; the record of proceedings reads: 'At 12 o'clock, the committee on credentials not having reported, on motion a rest was taken until 2 P.M.,' at which hour the attempt was given up for that day. Thus the headless house continued taking 'rests' throughout the 40-day session. Oregon's domestic legislation was at an absolute standstill. Not a bill of any kind could be passed, not even an appropriation bill for current expenses, so that while the regular taxes were bringing in a revenue, for fifteen months or more the bills of the state had to be paid in warrants drawing interest at eight per cent.<sup>1</sup>

Such was the inglorious record of this legislature, 'powerless to be born,' its miserable plight being due simply and solely to the power which legislative election, under Oregon's constitution, placed in the hands of one man whose inordinate ambition could relinquish no slightest chance of winning a Senate seat, no matter how great the injury done his state.<sup>2</sup>

#### CONFUSION AND CORRUPTION OF STATE POLITICS

Not only did the state suffer through the interruption of its legislative work, but the election of Senators injected into state politics an incongruous and disorganizing element. It proved one of the strongest influences tending to submerge state parties and to subordinate local issues, of however great importance. These effects were not to be gauged by statistics, but they were matters of the commonest observation and of the utmost significance. Not only might an impending election of Senator throw into the background every consideration of state affairs in the election of members of the legislature—it might even subordinate all interest in a presidential campaign.

<sup>1</sup> For a vivid account of this annihilation of a state legislature, see speech of Representative Tongue, of Oregon, in the House, May 11, 1898, *Cong. Rec.*, 4819; G. H. Haynes, *op. cit.*, 67, 193.

<sup>2</sup> John H. Mitchell. He had already been Senator for two terms, and was re-elected in 1901, but before the end of his term died under sentence of imprisonment for having taken money for using the influence of his high office to further land frauds against the United States. By the irony of fate, a more persistent and tireless advocate of the election of Senators by direct vote of the people the Senate had rarely known.



'This year the question is not "Roosevelt or Parker?" but "Addicks or no Addicks?"' These words, attributed to Addicks himself in 1904, stated the exact truth of the situation in Delaware.

---

In 1866 Congress prescribed a system of regulation intended to correct the abuses which had grown up in connection with senatorial elections. Yet for nearly fifty years thereafter dissatisfaction with the working of legislative election steadily increased. What were the reasons for this? The experience above cited makes reply: not a few, but nearly half the states of the Union suffered from serious deadlocks. These contests, the outcome of which was often as much a matter of chance as would be the throw of dice, aroused men's worst passions and gave rise now to insistent charges of bribery, now to riot, to assault and to threats of bloodshed, such that legislative sessions had to be held under protection of martial law. Fourteen contests lasted throughout an entire session of the legislature without effecting an election. Four states submitted to the heavy cost and inconvenience of special sessions to elect Senators. Six states preferred to accept vacancies, thus losing their 'equal suffrage in the Senate,' while the country was deprived of a Senate constituted as the fathers had intended. At times legislative election led to positive and flagrant misrepresentation of the state in the Senate. To the individual state it brought a domination of state and local politics by the fierce fight for a single federal office, and interference with the work of lawmaking, ranging all the way from the exaction of a few hours of the legislators' time to the virtual annihilation of the legislature, which had been constituted to care for the interests of the state. Experiences such as these, exceptional though they were, nevertheless became so frequent and so widespread that they gave rise to a determined movement which no longer contented itself with attempts to correct obvious defects in the law by which Congress had regulated the election of Senators, but which demanded that these elections be taken from the legislatures and be placed directly in the hands of the people.

## THE MOVEMENT FOR THE ELECTION OF SENATORS BY THE PEOPLE

---

### IN CONGRESS: RESOLUTIONS TO INITIATE POPULAR-ELECTION AMENDMENT

Although the first decades of the nineteenth century saw a far-reaching democratization of the state constitutions, shown most clearly in the great extension of the list of officers chosen directly by the people, for eighty years the agitation for popular election of United States Senators was but desultory and sporadic. In all that time there were introduced in Congress only nine resolutions proposing a constitutional amendment to accomplish that object, and not one of these resolutions emerged from committee.<sup>1</sup>

In the early seventies, however, there began a marked increase in the number of these resolutions.<sup>2</sup> From the first, for obvious reasons, the agitation for the proposed change had been mainly in the House, not in the Senate. Scores of memorials and petitions, together with resolutions, were referred to its Committee on Election of the President, Vice-President and Representatives in Congress, and there met their quietus. But in 1892 that committee reported favorably a joint resolution for the submission of the desired amendment to the States. Five times in the following decade such a resolution was brought to a vote in the House, and in every case the result was over-

<sup>1</sup> The first was introduced Feb. 14, 1826, by Representative Storrs of New York. (H. V. Ames, *The Proposed Amendments to the Constitution, 1789-1889*, 24; 60-63.) There was never a more pertinacious advocate of the election of Senators by direct vote of the people than Andrew Johnson. Twice, while a member of the House, he introduced resolutions with that object. Again in the Senate, in 1860, he renewed the agitation. As President, in 1868 he sent a special message to Congress advocating the measure (July 18), and in his annual message of the same year (Dec. 9) he repeated the recommendation.

<sup>2</sup> In the following decade the increase was still more rapid: in the 50th Congress, 6; in the 51st, 9; in the 52d, 17 by Representatives from as many different states, and three by Senators. From 1825 to 1912 not less than 287 joint resolutions were introduced in Congress, calling for such a constitutional amendment.

whelmingly in its favor;<sup>1</sup> but in the Senate not once was such a proposed amendment allowed to reach a vote till 1911. Such an amendment was ardently advocated by Senators Mitchell (Oregon), Palmer (Illinois), and Turpie (Indiana), and their resolutions, together with many petitions and memorials, were referred to the Committee on Privileges and Elections, which for years continued to ignore them. June 5, 1896, for the first time the committee reported favorably such a joint resolution and strongly urged its adoption.<sup>2</sup>

Meanwhile the rising sentiment in favor of the change had manifested itself in many ways, the country over, and ever-increasing pressure had been brought to bear upon Congress to submit the amendment to the States. Farmers' associations, 'granges,' and other local organizations, particularly in the Western States, sent in their petitions for it. In state elections it became a favorite 'plank,' particularly in Democratic and Populist platforms. Finally the national parties took it up. It appeared in the platform of the People's Party at every election, beginning with 1892. The Democrats gave it their endorsement in 1900, 1904, 1908, and 1912. At the Republican national convention in 1908, La Follette's resolution favoring the amendment was rejected by a vote of 866 to 114, but in his speech of acceptance the nominee, Taft, thought it good policy to say: 'With respect to the election of Senators by the people, personally I am inclined to favor it, but it is hardly a party question.'<sup>3</sup>

But the amending of the Constitution is not to be accomplished by the easy process of signing petitions or endorsing resolutions in party conventions: it must wait upon the formal action of Congress and of the states. As early as 1874 the legislatures of California and Iowa set the example of addressing Congress in favor of an amendment providing for the election of Senators by the people. In the fifteen years after 1890 this action was widely imitated, but the

<sup>1</sup> HOUSE VOTES UPON SUBMISSION OF AMENDMENT FOR POPULAR ELECTION  
OF SENATORS

<i>Congress</i>	<i>Date</i>	<i>Aye</i>	<i>No</i>
52d	Jan. 16, 1893	Two-thirds	—
53d	July 21, 1894	141	51
55th	May 11, 1898	185	11
56th	April 13, 1900	240	15
57th	Feb. 13, 1902	Two-thirds	—

The great increase in the favoring majority is highly significant.

<sup>2</sup> In the 52d and 53d Congresses, minority reports from this committee, opposing its majority, had favored the amendment.

<sup>3</sup> In a speech in the Senate, May 31, 1910, Senator Owen presented a comprehensive statement of the political organizations and of the action by state legislatures advocating the amendment. *Cong. Rec.*, 7109 ff.



demand was to some extent localized.<sup>1</sup> Of the North Atlantic States, Pennsylvania's legislature was the only one to endorse the movement. Among the Southern States, on the other hand, only four had not yet called upon Congress to act in the matter, and of the North Central and Western States every legislature had at least once sent its memorial or petition to Congress, and several had thus importuned every Congress for a decade. In short, by 1905 the sentiment in favor of making this change in the Constitution had been tested by five votes in the House of Representatives, by referenda in three states where the issue was brought to a direct popular vote, and by the action of the legislatures of thirty-one states — more than two-thirds of the number of states then in the Union — signifying to Congress their desire that steps be taken to initiate this amendment.<sup>2</sup> Nor does this adequately gauge the approval which the proposal was securing, for an analysis of the vote in the House, April 13, 1900, shows that with but two exceptions — Maine and Connecticut — every state in the Union through its Representatives, regardless of party affiliation, thereby gave it emphatic endorsement.<sup>3</sup>

#### POPULAR CONTROL OF SENATORIAL ELECTIONS BY STATE ACTION

Three Congresses ran their course without this proposal's being again brought to a vote.<sup>4</sup> Obviously it would have been useless to force a new joint resolution through the House as long as opposition within the Senate was presenting an impassable barrier. Hence the question kept recurring whether the object sought might not be attained by less formal methods than constitutional amendment. To this day the President is legally elected by presidential electors, but everyone recognizes that 'usage has made the presidential electors strictly the instruments of the party which has elected them.'<sup>5</sup> Might

<sup>1</sup> Before memorializing Congress upon the subject, the legislatures of three states provided for a formal test of the sentiment of the voters by referenda at general elections, with results overwhelmingly in favor of the amendment: California, fourteen to one; Nevada, eight to one; Illinois, six to one. For record of the actual votes, see Haynes, *op. cit.*, 106.

<sup>2</sup> For a tabulation of the action taken by state legislatures in favor of the direct election of Senators during these fifteen years, see Haynes, *op. cit.*, 107-10.

<sup>3</sup> *Ibid.*, 112-14. Votes against it were recorded from only eight states, three from the North Atlantic group.

<sup>4</sup> The 58th, 59th, and 60th.

<sup>5</sup> James Russell Lowell's reply, when, though elected as a Republican elector in 1876, he was urged to exercise his independence and vote for Tilden. W. D. Howells, in *Scribner's Magazine*, XXVIII, 373. In 1932 the *Electors'* names did not appear at all on the Massachusetts ballot used in the election of President, but only the names of the party candidates for President and Vice-President!



not the election of Senators by state legislatures be made an equally perfunctory act, the real choice having been dictated in advance by the people?

*Endorsement or Nomination of Senatorial Candidate by State Convention*

This form of putting pressure upon the legislature was made use of in Illinois in 1858, when the Democratic convention endorsed Douglas's position on the Kansas question and the Republican convention declared Lincoln to be 'our first and only choice for United States Senator.' In point of law, the great debate which followed was but an incident in the election of a legislature, with which alone rested the power to elect a Senator; but the whole country knew who was to be Senator, as soon as the votes for the members of the legislature had been counted. Four years later Charles Sumner's adherents in the Massachusetts state convention secured, not without opposition, the adoption of a complimentary resolution nominating him for re-election. In the legislature he was elected without opposition and as a matter of course. But in states where party lines were not closely drawn or where the issues were blurred, this skirmish in the convention by no means decided the campaign.<sup>1</sup> Even where the convention's endorsement did make the election of its nominee absolutely certain, this involved not a whit of popular control over the election in a state where the convention's act merely registered the will of the ring or of the boss.<sup>2</sup>

*Nomination by Direct Primary*

In the decade from 1890 to 1900 throughout the country it became more and more the tendency to turn to the direct primary as a remedy for the abuses of the nominating convention. Thus in Illinois, 1890, at the time of election of delegates to the Democratic state convention, the voters, given a chance to express their choice for Senator, registered their preference for John M. Palmer; his candidacy was endorsed by the convention, and became the main issue in the election of the legislature. Yet despite the fact that the Palmer candidacy was backed by 'a plurality of 30,000,' the legislature was deadlocked for several weeks before his election was effected.<sup>3</sup> But in the Southern States, where one party was absolutely dominant, senatorial elections

<sup>1</sup> Haynes, *op. cit.*, 134.

<sup>2</sup> *Ibid.*, 224; J. A. Woodburn, *The American Republic*, 221.

<sup>3</sup> *Cong. Rec.*, 3197, April 13, 1892.

soon came to be finally decided in the primaries. As Governor Jeff Davies declared: 'Of course, the legislature has no duty depending upon them but to cast their vote for the person declared the successful candidate [in the primary] by the state convention. This is absolutely equivalent to the election by the people.'<sup>1</sup> How atrophied the legislature's electoral function soon became was evident from the frequency of *unanimous* elections,<sup>2</sup> despite the fact that many of them had been preceded by most acrimonious campaigns and by close votes in the primaries.

### *Primary 'Elections' of Senators*

The Western States, where no such one-party dominance obtained as in the South, were not content with the endorsement of senatorial candidates by the state convention nor even with their nomination by primaries, but presently insisted that all the forms of a popular election be gone through, the whole process being under the supervision, not of party leaders, but of state officials. In this movement Oregon took the lead.<sup>3</sup> Utterly disgusted with the corruption, the deadlocks, the absolute disruption of her legislature which had attended recent senatorial elections, in 1901 Oregon enacted a law under which the voters expressed their choice for Senator by precisely the same process as that used in electing their Governor. Of course, as applied to candidates for the Senate the 'election' had no legal force, but 'the people's choice' was to be forcibly obtruded on the attention of the legislature, for the law required that when the two houses of the legislature should assemble to elect a Senator, the returns of the popular election should be laid before them, 'and it shall be the duty of each house to count the votes and announce the candidate having the highest number, and *thereupon* the houses shall proceed to the election of a Senator.' It would hardly seem possible to say to the legislature more plainly: 'This is the way. Walk ye in it.' Nevertheless, the first trial of this law proved a complete *fiasco*. In the house, the man who had received a majority of thirty-seven

<sup>1</sup> Letter to the writer, Aug. 29, 1904. In that year's legislature of 135 all but two were Democrats.

<sup>2</sup> In 1900, in Alabama, and two in Louisiana; 1901, in South Carolina; 1904, in Louisiana, and two in Mississippi. Senators in the *Congressional Directory* described their victories thus: 'Was elected to the United States Senate by 17,700 majority over J. G. Evans' — omitting all reference whatever to the legal election by the legislature. (Latimer, South Carolina, 1903.)

<sup>3</sup> The earlier preference votes in Nebraska and Nevada were interesting, but their influence was negligible. Haynes, *op. cit.*, 141-43, 145.

per cent in the popular vote secured only a small minority, the members distributing their votes among fourteen candidates. At once a deadlock developed which lasted five weeks and on the forty-second joint ballot resulted in the election of a man who had not received a single vote in the much-vaunted popular election which had been instituted for the express purpose of affording the people 'an opportunity to instruct their senators and representatives in the legislative assembly as to the election of a Senator in Congress from Oregon.'<sup>1</sup>

### *The Developed 'Oregon System'*

To many outside observers this experience seemed to prove that in senatorial elections the people's choice could be secured against reversal in the legislature only by an amendment to the Constitution requiring that Senators be elected by direct vote of the people. But the people of Oregon were not so sterile in political devices. This was precisely the kind of an emergency which their new initiative process had been designed to meet. By initiative petition a 'direct primary nominating elections law' was forthwith launched; it was approved by a majority of more than three to one at the general election in June, 1904. It affected senatorial elections from several different angles. Nomination of candidates for the Senate, as for Oregon state offices, was to be by duly signed petition. With his petition the candidate was permitted to file a hundred-word statement of the measures or principles which he proposed to advocate while in office, and a twelve-word statement to be printed after his name on the nominating ballot. Electors seeking nomination for office as senator or representative in the legislative assembly were permitted to include in their petitions their signatures to either 'Statement No. 1' or 'Statement No. 2.'

In the former, the signer solemnly pledged himself always to vote 'for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress, without regard to my individual preference.'

In the second, the signer declared that as a member of the legislature he would 'consider the vote of the people for United States Senator . . . as nothing more than a recommendation, which I shall be at liberty to wholly disregard if the reason for so doing seems to me to be sufficient.'

Naturally, few aspiring politicians would sign Statement No. 2. But the Oregon voters were not in a mood to take chances: they

<sup>1</sup> G. H. Haynes, *op. cit.*, 145-47. So read the ballot title of the law.



wanted positive assurance. Where the law ended, effective popular agitation began. Earnest advocates of election by the people circulated a pledge, in which the Oregon citizen pledged his sacred honor that he would not, under any circumstances, sign the petition of, or vote for the nomination or the election of, any candidate for the legislature who did not subscribe to 'Statement No. 1.' In a few months this pledge had been signed by many thousands.

It chanced that at the convening of the first legislature elected after the enactment of this law two Senators were to be elected. In earlier days when a senatorial election was in progress, Salem had by no means been a 'City of Peace,' but the scene of an aborted legislature (as in 1897), or of bitter deadlocks, often ending in a stampeded election in the closing hour of the session's life, amid charges of corruption. But on this occasion a newspaper reporter recorded the result thus: 'On the first ballot, in twenty minutes, we elected two Senators, without boodle, or booze, or even a cigar!'

To the country at large this was an arresting demonstration that popular control of senatorial elections might be secured without amendment of the Constitution. Yet the demonstration was not conclusive, for that Oregon legislature was overwhelmingly Republican,<sup>1</sup> and Republican candidates had had a strong lead in the popular election. The supreme test came two years later.<sup>2</sup> In the popular election, owing to factional contests among the Republicans and to the popularity of the Democratic aspirant, Governor George E. Chamberlain, the Democrat emerged as 'the People's Choice,' whereas the Republicans elected a majority in both branches of the legislature.<sup>3</sup> The significant fact was that, of the ninety members elected to the legislature, fifty-two — mostly Republicans, and six more than the majority necessary to elect in joint assembly — had signed Statement No. 1, thus binding themselves to vote for the candidate who had won in the popular election. And they stood fast. When their names were called in the legislative election, one Republican after another answered that, though his personal and party preference was

<sup>1</sup> Eighty-three Republicans to seven Democrats.

<sup>2</sup> Meantime, by initiative process, Oregon voters had made this a part of their law:

We, the people of the State of Oregon, hereby instruct our representatives and Senators, in our legislative assembly, as such officers, to vote for and elect the candidates for United States Senators for this State who receive the highest number of votes at our general elections. (1908.)

<sup>3</sup> It was alleged that in the popular primary nominating election Democrats in large numbers had voted for Republican aspirants for the senatorship with the view of splitting the Republican vote, and securing the lead for the more vulnerable candidate.



for another man, constrained by his pledge he felt compelled to vote for the Democratic candidate. Chamberlain received fifty-three votes, holding every one of the pledged members and getting the support of one who was not thus bound.

### *Following Oregon's Lead*

The country at large took note that, in a situation where voting contrary to party ties was peculiarly repugnant, these members of the Oregon legislature, without exception, had voted in compliance with the pledge by which they had surrendered their personal discretion, and elected the 'People's Choice.' Five years had not passed from the date of that election when the last chapter was added to this long record of struggle, and the proclamation of the ratification of the Seventeenth Amendment made the election of Senators by direct vote of the people the law of the land.<sup>1</sup> Those few years saw widespread copying and adaptation of the 'Oregon System' by other states, flagrant abuses of legislative elections which strengthened the determination to get rid of their 'clumsy indirection,' a brief but determined struggle for the amendment in Congress, in which the Senate took the lead, and prompt ratification by the state legislatures.

It is safe to say that during the five years preceding the proposal of the Seventeenth Amendment by Congress there was not a legislature of a state not under one-party rule in which a careful study was not made of the 'Oregon model.' Many and varied were the copies and adaptations that were made, all with the object of securing an expression of popular choice which the members of the legislature would feel bound to confirm. With the backing of William J. Bryan, the Nebraska legislature enacted a law providing that would-be candidates for the legislature with their nomination-petitions might file their signatures to 'Statement No. 1' or 'Statement No. 2' in phrasing identical with those used in Oregon, but the Nebraska law went further in requiring that upon the official 'primary election ballot' after the names of those who had signed the former should be printed the words, 'Promises to vote for people's choice for United States Senator,' while after the names of those who had signed the latter should be printed, 'Will not promise to vote for people's choice for United States Senator.'<sup>2</sup> Still more drastic was the North Dakota law which

<sup>1</sup> Chamberlain was elected Jan. 19, 1909; the Seventeenth Amendment was proclaimed May 31, 1913. On the eve of the Oregon election the press reported: 'A people's lobby is assembling from every section of the state determined apparently to see that the pledged members abide by their obligations to vote for Chamberlain.'

<sup>2</sup> *Nebraska Laws* (1909), 253.

made it not merely permissive but mandatory that the petitions of all would-be candidates for the legislature 'contain a pledge to the people that they will support and vote for that candidate of their party, for United States Senator, who has received a majority of such party votes for that position at the primary election, or at the succeeding general election.' The supreme court of North Dakota held this particular provision of the law to be invalid, on the ground that, in 'requiring legislative candidates to take and subscribe the oath therein prescribed and pledge aforesaid,' it violated the constitution of North Dakota, 'in that it adds another oath, declaration and test, as a qualification for office'; but sustained the validity of the other provisions of the act 'providing a method for permitting the electors to designate their choice of a candidate for the United States Senate.'<sup>1</sup>

So rapid became the sweep of senatorial primaries under Oregon's lead that in December, 1910, before the state legislatures had been convened which were to elect Senators, it was declared: 'Fourteen out of the thirty Senators who take the oath of office at the beginning of the next Congress, have already been designated by popular vote.'<sup>2</sup> In that same month Woodrow Wilson first caught the attention of the country at large by intervening in a senatorial election. As Governor-elect he assumed the leadership of the Democratic Party in New Jersey and issued a formal statement in which he boldly declared that in the coming session of the legislature 'self-respecting Democrats' could vote only for Martine, the Democrat who had led in the primary, but who was not backed by the party machine.<sup>3</sup>

<sup>1</sup> *State v. Blaisdell*, 18 N. D. Rep., 55, Oct. 29, 1908.

<sup>2</sup> *Boston Herald*, Dec. 26, 1910.

<sup>3</sup> This nomination had been forced on Martine, against his will. Wilson thought him inadequate for the position. 'It required many weeks to win Wilson over and convince him that standing by Martine was a clear issue of good faith and observance of party pledges.' James Kerney, *The Political Training of Woodrow Wilson*, 40.

At a meeting of the seminar in history and politics at the Johns Hopkins University in 1893, a graduate student presented a paper on 'Popular Election of United States Senators.' (*Johns Hopkins University Studies in History and Political Science*, 11th Series, 547. By John Haynes.) The present writer recalls with interest that on that occasion Woodrow Wilson, then one of the corps of lecturers, in vigorous terms characterized discussions of the advantages of the popular election of Senators as academic and futile, since the change could be accomplished only by amending the Constitution, which was impossible. By 1910 he had changed his mind.

To a letter from the present writer expressing surprise at this change, Governor Woodrow Wilson replied as follows:

I do not wonder that you are curious to know what the progress of my thought has been. To tell the truth, I have come to see that we must argue about changes, not as contrasted with the literary theory of our government, but as contrasted with what its actual operation is. It is the study of this contrast that has led me to believe in the popular election of Senators and

## FINAL EXAMPLES OF ELECTION OF SENATORS BY STATE LEGISLATURES

In the last five years of legislative election of Senators abundant illustrations were afforded of the worst features of that system. A few instances may be cited. In 1907, in Wisconsin, the Stephenson campaign, both in the primary and in the legislature, was so noisome as to call for long investigation by the Senate, which brought to light extremely damaging evidence. In that same year, the Rhode Island legislature took eighty-one ballots, twenty-five on the closing day of the session, but without avail, so that for ten months the state was represented by but one Senator. In Kentucky, in 1908, a two-month deadlock was finally broken by the shift of four Democrats to Bradley, thus electing the Republican. Bryan, who had gone to Kentucky to campaign for the Democratic primary's choice, denounced these four as 'embezzlers of power' — guilty of a 'worse crime than the embezzling of money,' and one of them was hanged in effigy. In 1909 a five-month deadlock in the Illinois legislature ended in the election of Lorimer, later unseated for bribery. In 1911 six state legislatures were in deadlock over senatorial elections. The Colorado legislature, after four months of struggle, adjourned without making an election, and the state had but one Senator in Congress for over a year. In Montana an election was effected only on the last day of the session.<sup>1</sup> In New York the first deadlock in a generation lasted three months

the primary devices by which the thing is virtually brought about without a Constitutional amendment.

What I said in my Inaugural address about the Oregon system was simply that I commended it most warmly to the studious attention of our own Legislature as a most interesting example of the successful attempt on the part of the people to get control of their own affairs. (March 27, 1911.)

<sup>1</sup> One of the humors of the year was the resolution passed by the Montana legislature censuring the action of certain members of the Massachusetts legislature. In Boston, after a few ballots, two Democrats and several Progressive Republicans, seeing that their own candidates could not be elected, voted for Henry Cabot Lodge who was elected by a narrow margin. Thereupon the Montana legislature passed a resolution declaring, 'We view with abhorrence and disgust the action of alleged Democrats in voting for a Republican,' and calling upon Montana's members in the Senate to demand a most rigid investigation of this election in which such voting seemed 'prima facie evidence of a corrupt bargain. . . . We regard any member of any legislative assembly who votes for one of the opposed political faith for United States Senator as a traitor to his constituents and a man unfit to remain as a member of any legislature.' The Montana legislators who joined in this lurid denunciation were then seated in the hall which had been the scene of some of the most sensational stampedes and some of the most flagrantly corrupt senatorial elections known to our history, and were at that moment in the opening stages of a deadlock which was to last many weeks longer to the end of the session. Obviously the righteously indignant resolution was mainly for the purpose of giving a little party discipline in Montana by applying the lash to Massachusetts. Resolution of Jan. 19, 1911. *Boston Herald* editorial, Jan. 21, 1911.



and ended in the election of a man who had been most active in Tammany politics for thirty years. Disreputable action in the West Virginia legislature was the basis of a contest over the seat in the Senate. Even after the Seventeenth Amendment had been submitted to the States and was on the eve of securing its last needed ratifications, there were deadlocks in four legislatures — Delaware, New Hampshire, West Virginia, and Illinois — in three of which the amendment had just been ratified. The unseating of Lorimer, July 13, 1912, created an Illinois vacancy in the Senate, which remained unfilled during the rest of that session and the entire third session of the Sixty-Second Congress. For more than three weeks at the opening of the next Congress, Illinois had no voice at all in the Senate, while her legislature, in deadlock since the first of the year, was taking a recess — the state's legislative business, meantime, being at a standstill — to enable Democrats and Republicans to come to an agreement as to the terms upon which the two vacancies might be filled. The election took place March 26, two months before the proclamation of the Seventeenth Amendment — an appropriate ringing-down of the curtain upon the election of Senators by state legislatures.<sup>1</sup>

## AMENDMENT XVII — POPULAR ELECTION OF SENATORS

---

### THE FINAL STRUGGLE IN CONGRESS

For nine years, 1902 to 1911, no resolution for the direct election of Senators was brought to a vote in either branch of Congress. Obviously it would be a waste of time and effort for the House to keep passing the resolution until there was some prospect that the Senate would let it reach a vote.

But during these nine years the movement was making substantial progress, though it was not recorded in positive action upon the journals. Not a Congress passed without the presentation of a large number of petitions and memorials urging the submission of the

<sup>1</sup> The New Hampshire legislature ratified the Seventeenth Amendment several weeks before breaking a deadlock which had lasted nearly three months.



amendment. Moreover, a most significant change was taking place in the form in which state legislatures made their wishes known. A joint committee, appointed by the Pennsylvania legislature in 1899 to confer with the legislatures of other states, reported their conviction that the Senate would not take favorable action in relation to the election of Senators by the people as long as it was optional with Congress to propose the amendment, and that the only hope lay in resort to the other method, as yet untried, for initiating an amendment — that the legislatures of two-thirds of the states apply to Congress to call a convention. The point was stressed that such an application would be mandatory — ‘Congress *shall call* a Convention for proposing Amendments.’ Following this suggestion, beginning in 1901 with increasing frequency the legislatures, instead of sending petitions ‘most respectfully requesting’ Congress to submit the desired amendment, presented a series of ‘whereases’ declaring that the people were in favor of popular elections, that the House had five times passed the amendment resolution by a two-thirds majority, but that the Senate had always refused to vote upon it, followed by the blunt: ‘Resolved: That application is hereby made to Congress to forthwith call a Constitutional Convention.’<sup>1</sup>

Some Senators who were opposed to popular election saw in this proposal of a constitutional convention a portent so big that they preferred to submit the specific amendment that was desired rather than incur the risks which might be opened up if such a convention were called.’<sup>2</sup> For the Federal Convention of 1789 gave classic proof of the impossibility of limiting in advance the changes which such a convention might launch.

Most influential in overcoming the Senate’s obstruction was the change which its own personnel had been undergoing, especially since Oregon had shown that it was practicable for any state, by its own legislation, to secure popular control of senatorial elections. No Senator, who in fact, though not in form, had been elected by the people, could antagonize the proposed amendment without seeming to stultify himself and to affront his constituency. In the last struggle in the Senate, the amendment’s most persistent advocates were men

<sup>1</sup> Form used in Montana and Arkansas resolutions of 1903.

<sup>2</sup> Heyburn, utterly opposed to popular election of Senators to the last, repeatedly dwelt on the danger that a constitutional convention, once assembled, would be importuned to propose amendments for the popular election of the President, for proportional representation in the Senate, and other ‘radical’ changes. In Senate, Feb. 7, 1911.

who had been thus elected. In the words of Senator Borah: 'I should not be here if it [election by the legislature under direct instructions of a popular vote] had not been practiced, and I have great affection for the bridge which carried me over.'<sup>1</sup>

A turning-point in the Senate struggle over this issue was reached December 13, 1909, when the Bristow resolution, at its maker's request, was referred to the Committee on the Judiciary.<sup>2</sup> Six months later, no report having been made, Bristow moved that that committee be discharged from further consideration of the resolution. Heyburn's objection prevented the motion's coming to a vote before the end of the session.

Early in the next session, January 1, 1911, Borah, from the Committee on the Judiciary, presented a strong report, favoring the adoption of the resolution as amended in committee.<sup>3</sup> In brief, the report maintained: that the economic, social, and industrial changes which had taken place since 1789 seemed to require a reconsideration of the method then chosen for electing Senators, not for the purpose of changing the fundamental principles of our Government, but for the purposes of maintaining the very principles which the fathers sought to establish; that in the Convention the method of electing Senators had nothing to do with the question of equal representation of states in the Senate; that Senators, elected by the people, would be just as truly representative of the state as when elected by its legislature; that legislative election seriously distracted legislatures in their regular work; that public opinion, not hasty but deliberate, was seriously and

<sup>1</sup> In 1903 Borah had been defeated in the Idaho legislature; four years later, after winning a majority in the popular vote, his election by the legislature followed at once, as a matter of course. Feb. 16 and 17, 1911, *Cong. Rec.*, 2647; 2774.

<sup>2</sup> Since 1871, the year in which the Committee on Privileges and Elections had been created, of twenty-one joint resolutions on this subject which had been presented in the Senate nineteen had been referred to that committee and only two to the Committee on the Judiciary. In the preceding Congress, May 23, 1908, Owen, a most persistent advocate of popular election, had sought to get direct consideration for his joint resolution, without reference to or report from a committee. Against his protest, by a vote of 33 to 20 it was referred to the Committee on Privileges and Elections. 'This vote,' he declared, 'meant the defeat of the proposed constitutional amendment.' Not a single Senator from a northeastern state voted against this reference, but on the other hand team-play in parliamentary obstructive tactics against consideration of the resolution was encountered from Aldrich, Hale, Lodge, Depew, Kean, and Penrose. Although the chairman, Burrows of Michigan, came from a state whose legislature had theretofore memorialized Congress in favor of the submission of such an amendment, no hearings were held, and no report made upon the Owen resolution. In the next Congress, Owen reintroduced the same resolution, which was again referred to this hostile committee. June 14, 1910, Owen sought in vain to get the proposal before the Senate.

<sup>3</sup> 61st Cong., 3d sess. S. Rep., 961, to accompany S. J. Res. 139.

imperatively in favor of the change, and could no longer go unheeded.<sup>1</sup>

The committee's amending of the measure was of great moment. The original Bristow resolution had simply provided for the election of Senators by direct vote of those people in the several states who might there vote for the election of the most numerous branch of the legislature. But the new resolution, reported from the committee, after providing that the Senators from each state should be elected by the people thereof, added the clause: 'The times, places and manner of holding elections for Senators shall be as prescribed in each state by the legislature thereof,' and it further provided that the section of the Constitution granting to Congress the power to alter state regulations as to elections<sup>2</sup> should be so modified as not to apply to the election of Senators by the people.

This amending doubtless served to get for the resolution a favorable report from the committee, but in the Senate it at once raised a new issue which proved most divisive. Opponents of the new resolution asserted that it proposed not one amendment to the Constitution but

<sup>1</sup> Some supporters of the election of Senators by the people showed a careless reading of history. Thus Beveridge not less than three times laid great stress on Madison's advocacy, referring to him as 'the proponent of the election of Senators by the people,' and again: 'Madison said he thought it would be better if the Senate should rest directly on the solid foundation of the people than on the pillars of state legislatures. I think I quote his exact words.' And W. L. Jones appealed to the same classic authority as one of the foremost advocates of popular election of Senators in the Convention. How greatly this distorts Madison's real attitude is evident from the following paragraph — from Madison's own report of the debate:

Mr. Madison considered the popular election of *one branch* of the national legislature as essential to every plan of free government. . . . *He was an advocate of the policy of refining the popular appointments by successive filtrations*, but thought it might be pushed too far. *He wished the expedient to be resorted to only in the appointment of the second branch of the legislature*, and in the executive and judiciary branches of the government. He thought, too, that the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand *merely* on the pillars of the legislature. (The italics are the writer's.)

Borah's report (61st Cong., 3d sess., S. Rep., 961) closed thus: 'We ought not to overlook, either, a statement by Mr. Madison, although *we do not contend* that he advocated election of Senators by popular vote' — and there was then quoted the last sentence of the above paragraph. Abandoning this caution, Beveridge glibly garbled that single sentence, substituting 'Senate' for 'the great fabric,' and ignoring the rest of the paragraph in which Madison had explicitly stated that he wished 'the policy of refining the popular appointments by successive filtrations . . . to be resorted to only in the appointment of the second branch of the legislature' . . . i.e., in the election of Senators. (Elliot, *Debates*, V, 137; *Cong. Rec.*, 2252, 2253, Feb. 10, 1911. For discussion of the debate in the Convention, see pp. 10-14.)

As to Madison's attitude, Mr. Charles Warren seems to have fallen into the same error as did Beveridge. 'Madison and Wilson continued to the end to argue in favor of founding the whole Government directly on the people, in both branches of the Legislative Department as well as in the Executive.' *The Making of the Constitution*, 196.

<sup>2</sup> Art. I, sec. 4.



two: the first, making Senators elective by direct vote of the people; the second, transferring to the states in express terms exclusive power to regulate elections of Senators while leaving unimpaired the power of Congress to regulate the elections of President and Representatives. Borah declared himself 'willing to take it [a popular-election amendment] with almost any trimmings, in order to get the real proposition for which we contend.' He insisted that both the Senate and the House had 'unlimited power to deal with the cleanliness and purity of the election' of their own members under the clause which makes each House the judge of their elections, returns, and qualifications,<sup>1</sup> and even went so far as to say: 'It is to be hoped that in time the wisdom of this [state regulation of senatorial elections] will be observed, and that there will be a law leaving entirely to the legislatures of the states the control of the manner of electing Representatives also.'<sup>2</sup>

But to almost every other Northerner this change, made by the committee, seemed not mere 'trimmings,' but the taking from the Federal Government of a power which might prove of vital importance.<sup>3</sup> Sutherland, a Republican member of the Committee on the Judiciary, forthwith offered an amendment practically restoring the resolution to its original form. In the later weeks of debate this Sutherland amendment, leaving federal control over senatorial elections unimpaired, aroused more heated discussion than the question of the proposed change from legislative to popular election of Senators. Southern members urged the committee's resolution, insisting that its effect would be merely to withdraw a formal right — since the Senate had never assumed a power to go back of the election of members to the legislature, but only to investigate the election of Senators in the legislature — whereas the effect of the Sutherland amendment would be to grant to Congress a vital power, and one very obnoxious to many states. They declared that state control over senatorial elections was the price of Southern States' assent to a popular-election amendment to the Constitution, and that they would not vote for the pending resolution if it carried the Sutherland amendment.<sup>4</sup> On the other hand, Republicans roundly denounced any attempt to take from the Federal Government a control over the popular election of Senators which

<sup>1</sup> Feb. 16, 1911, *Cong. Rec.*, 2645-46.

<sup>2</sup> Jan. 13, 1911, *ibid.*, 851.

<sup>3</sup> Some insisted that, in providing that the times, places, and manner of holding senatorial elections should be '*as prescribed* by the legislatures,' the resolution had ceased to make mandatory the holding of any elections for Senators, since state legislatures might choose not to '*prescribe*.'

<sup>4</sup> Percy (Miss.), *Cong. Rec.*, 2128-30; Bacon (Ga.), 3536.



followed logically from the Constitution's express grant of such control over the only elections of federal officers (presidential electors and Representatives) given to the people;<sup>1</sup> and earnest advocates of popular election declared that they would not vote for the pending resolution *unless* it carried the Sutherland amendment.<sup>2</sup>

Consideration of the resolution went forward under the astute and pertinacious leadership of Senator Borah. Hardly had it been reported from committee when he sought to have a definite time fixed by unanimous consent by which action should be taken upon it, and gave formal warning that unless such an agreement were made, 'there will be a very small amount of business done until this matter is disposed of.'<sup>3</sup> Failing in this he succeeded in having it made the unfinished business. From time to time he consented to have it laid aside, but when his repeated requests for fixing the time for final vote encountered objection — usually from his Idaho colleague — and the end of the session drew near, he declared that the denial of these requests was 'convincing proof to anyone that there is a disposition to prevent any vote at all.'<sup>4</sup> To the plea that an absent Senator wished to be heard before the yeas and nays were taken, he grimly replied, 'We will either have the yeas and nays, or someone will speak!' and his obstinate colleague had to thresh old straw till the hour arrived which had been fixed upon for a special order of business.<sup>5</sup> Only motions to adjourn or to proceed to the consideration of executive business could shake his hold.

After the resolution had been before the Senate for more than six weeks, the vote came upon the Sutherland amendment, which was passed by a large majority.<sup>6</sup> In the few days which then intervened before final action, the debate turned almost wholly upon this issue of federal control of senatorial elections, and at the very last moment Bacon of Georgia tried in vain to get a vote upon an amendment which would limit that control. February 28, 1911, the fate of the joint resolution was decided. For the first time in the Senate's history, it had been brought to vote upon the direct issue of the election of

<sup>1</sup> Lodge, *Cong. Rec.*, 1976-80; Root, 2241-46. Citing Percy's statement that the Sutherland amendment was 'a price greater than the South is willing to pay for the election of Senators by direct vote of the people,' Root closed his speech: 'The time has not yet come when the people of this nation are entering the market-place to buy from them or from any of them the right to preserve and protect, by the exercise of our own national power, the Government of the United States under its Constitution.'

<sup>2</sup> Curtis, *ibid.*, 2426-27; Jones (Wash.), 3545 ff.

<sup>3</sup> Jan. 12, 1911, *ibid.*, 852.

<sup>4</sup> Feb. 17, 1911.

<sup>5</sup> Feb. 20, 1911.

<sup>6</sup> Feb. 24, 1911. Yeas, 50; nays, 37; not voting, 4.

Senators by the vote of the people. The resolution was lost by the failure of the requisite two-thirds majority.<sup>1</sup> But the margin was so narrow that a shift of five votes in the number actually voting would have sent the proposed amendment to the states. It was clear that the advocates of the change would not have long to wait.<sup>2</sup>

In fact, the end of this long contest came more quickly than could have been anticipated. Five weeks after the taking of the above vote, the new Congress was convened in special session, and in both branches resolutions for proposing amendments for election of Senators by the people were at once introduced. Only two days after its committees had been appointed, the House received a favorable report upon such a resolution. This astonishing speed was made possible by the fact that its resolution and its report were verbatim copies of those which had been reported to the Senate, three months earlier, by Senator Borah. That very day the House proceeded to the consideration of the measure, debate being limited to three hours for each side. Opposition to taking from the Federal Government the power to control senatorial elections took the form of an amendment like that which had been introduced by Sutherland, the previous session in the Senate, but this was rejected,<sup>3</sup> and the committee's resolution was then passed by the sweeping vote of 296 yeas to 16 nays.<sup>4</sup>

In the Senate this joint resolution, received from the House, was referred to the Committee on Privileges and Elections, but this action was soon reconsidered, and it was sent to the Committee on the Judiciary, from which, within half an hour from the time when the Senate committees took jurisdiction, Borah reported it back favorably, without amendment.<sup>5</sup> After two attempts to have the resolution

<sup>1</sup> Yeas, 54; nays, 33; not voting, 4.

<sup>2</sup> Owen later stated that twenty-two of the Senators who had voted for the Sutherland amendment voted against the resolution four days later, thus recording themselves against allowing 'the people the right of directly voting for Senators at all.' Of these twenty-two, seven retired from the Senate before the next session. He declared: 'On this issue the Republicans lost Maine, Massachusetts, New York, New Jersey, Ohio, Indiana, and very nearly lost Pennsylvania.' (June 12, 1911, *Cong. Rec.*, 1923.) Exaggerated as that statement is, it is evident that the opposition in the Senate was crumbling.

<sup>3</sup> Yeas, 123; nays, 189; 'present,' 2; not voting, 75.

<sup>4</sup> Not voting, 70.

<sup>5</sup> Borah advocated its being transferred to the Committee on the Judiciary, on the ground that it had fared better before that committee than before the other, and that 'there are matters involved in the resolution upon which the Judiciary Committee, in the discharge of its proper functions, and the exercise of its proper jurisdiction, ought to consider.'

Borah acknowledged that the committee had determined upon this report at a meeting held before the hour when, according to Heyburn's contention, this committee of the new Congress was authorized to sit and direct a report to be made.

made the unfinished business before it was brought up, Borah succeeded, May 8, in getting the Senate to recess till 4 p.m., and then moved that the Senate take up House Resolution 39. The passage of this motion by a vote of 66 to 5 made the resolution the unfinished business, and indicated that it could no longer be blocked by obstructive tactics.<sup>1</sup> The next day Borah gave notice of his intention to press for a continuous consideration of the measure, adding that he wanted to employ all the possible time, except the actual sleeping hours, until it was disposed of. From day to day he consented that it be temporarily laid aside, but he held control of the Senate's time until May 24, when he extorted a unanimous consent agreement that June 12 the Senate should take up the resolution immediately at the close of the morning business, and vote upon all amendments and upon the joint resolution itself before the conclusion of the legislative day.

Meantime Bristow had proposed a substitute, identical with the Sutherland amendment in the previous session; and again the debate shifted from the question of election by the people to that of federal control of senatorial elections. Stone of Missouri declared that the issue was frankly partisan and sectional.

Every Democratic Senator in this chamber is heartily in favor of the joint resolution as it came from the Judiciary Committee, and every Senator on this side, with possibly one exception, is opposed to the substitute offered by the Senator from Kansas. Senators on that side, with few exceptions, will vote for this substitute.

A minority report from the Committee on the Judiciary, signed by six Republican members, declared that the joint resolution as it came from the House and was reported by the majority of the committee was open to the same defect as the one which the Senate had amended in the previous session, in that it proposed two distinct amendments.<sup>2</sup> In reply to the contention that the resolution's limitation of federal control was purely formal, the minority called attention to the fact that this resolution was a verbatim copy of the one which had been introduced by St. George Tucker and been passed in the House in 1893, of which the eminent lawyer who sponsored it said: 'It is proposed to abrogate and amend any provision of the Constitution in so far as it gives Congress any control, absolute or remote and contingent, over the election of Senators.' Three of the Senators who

<sup>1</sup> Nays: Brandegee, Burnham, Gallinger, Penrose, Heyburn.

<sup>2</sup> May 22, 1911. Signed by Clark, Nelson, Dillingham, Sutherland, Brandegee, and Root.



joined in this minority report further put on record their opinion that the change from legislative to popular election of Senators was inexpedient and unnecessary, that it would prove injurious rather than beneficial, and that the alleged abuses of the existing method could be obviated without any amending of the Constitution, by a simple act of legislation, for which purpose a bill had already been introduced by Senator Root.<sup>1</sup>

The Senate debate upon the joint resolution covered little ground that had not been traversed in the previous session. The result of the vote upon the Bristow amendment was announced thus by the Vice-President: 'On this vote, the yeas are 44, and the nays, 44. The Chair votes in the affirmative. The yeas have it, and the amendment is agreed to.'<sup>2</sup> Upon the resolution thus amended the Senate vote stood: yeas, 64; nays, 24; not voting, 3.<sup>3</sup> Analysis of the opposition in this vote shows that it included eight Senators from Southern States, doubtless favorable to popular election but bitterly opposed to federal control; every Republican Senator present from the New England States, New York, and Pennsylvania; and four Republicans from Delaware, Illinois, Utah, and Idaho.<sup>4</sup> When the amended joint

<sup>1</sup> Signed by Dillingham, Brandegee, and Root. Senate Bill No. 123, 62d Cong., 1st sess.

By this bill it was proposed to amend the Act of 1866 by adding the following: 'If no person receives such majority within twenty calendar days after the day upon which the members of the two houses are required first to convene in joint session, then the person who thereafter receives a plurality of the votes of the joint assembly — such plurality being not less than one third of the total membership of both branches of the legislature — a majority of all members elected to both houses being present and voting, shall be declared duly elected.' It is obvious that this would have remedied some, but not all, of the defects of the law under which Senators had been elected by state legislatures. It was to go into effect January 1, 1912.

<sup>2</sup> June 12, 1911, *Cong. Rec.*, 1923. The Vice-President's right to give a casting vote in this situation was protested by Reed; the following day, before the approval of the *Journal*, Bacon spoke at length upon the point, declaring that, as it was not a matter of legislation, the vote should have been declared a tie, and the Bristow amendment lost. (H. H. Gilfry, *Precedents of the United States Senate*, I, 564-65.) Finally, on a motion to reconsider the vote by which the joint resolution was passed and to request of the House of Representatives a return of the joint resolution to the Senate, the vote stood: yeas, 33; nays, 33 — and the motion was declared lost. *Cong. Rec.*, 1966.

<sup>3</sup> This vote was identical with that which had been taken a few moments before 'in Committee of the Whole.' The interval gave Bacon of Georgia an opportunity to make his last stand, by offering an amendment to limit federal control, in the precise language used in a resolution approved as a desirable amendment by the New York Convention in ratifying the Constitution in 1788, viz.: 'The times, places and manner of holding elections of Senators shall be as prescribed in each state by the legislature thereof; but Congress may make such regulations in any state whenever the legislature thereof shall neglect or refuse to make such regulations, or from any circumstances be incapable of making the same.' This was defeated by a vote of 43 yeas to 46 nays. Elliot, *Debates* (1827), I, 356.

<sup>4</sup> Richardson, Lorimer, Smoot, and Heyburn. *Cong. Rec.*, 1925.



resolution came again before the House, after debate limited to three and a half hours, a motion to concur was defeated.<sup>1</sup> The Senate, thereupon, voted to insist upon its amendment, and to ask for a conference, and named its conferees.<sup>2</sup> The House then voted further to insist upon its disagreement and its conferees were named.

The session came to an end, and four months of a new session passed without bringing any statement from the conference committee. Finally, in response to Borah's insistent inquiries, the chairman of the Senate group reported that, although no less than sixteen joint meetings had been held, the conferees had not been able to reach an agreement, and upon his motion the Senate voted still further to insist upon its amendment.<sup>3</sup>

A fortnight later the chairman of the House conferees moved that the House recede from its disagreement and that it concur in the Senate amendment. By unanimous consent debate was limited to one hour on a side, after which the previous question was to be ordered. A momentous decision was to hang on that vote. Said Lenroot:

It is going to be determined today by this House whether a great reform, long demanded by the American people, is to be granted or not. The responsibility is not going to rest on the Senate. If it shall fail, it shall rest on this House.

Under the sense of that responsibility the joint resolution was adopted by a vote of more than six to one.<sup>4</sup>

#### RATIFICATION OF THE AMENDMENT

---

In the earlier years of agitation for this change in the Constitution, from time to time it was suggested that it might be expedient for Congress to require that the amendment, when proposed, should be ratified not by the state legislatures — since in a way they were parties in interest, and might be inclined to reject an amendment

<sup>1</sup> June 21, 1911. Yeas, 111; nays, 171; not voting, 97.

<sup>2</sup> June 27, 1911.

<sup>3</sup> April 23, 1912. Yeas, 42; nays, 36. *Cong. Rec.*, 5172.

<sup>4</sup> May 13, 1912. Yeas, 238; nays, 39; 'present,' 5; not voting, 110. *Cong. Rec.*, 6367.

which would strip them of one of their greatest political powers — but by conventions chosen for that purpose — the process by which the Constitution itself had been ratified. But by 1912 public opinion seemed so pronounced in favor of the change that in Congress no such departure from the ordinary amending procedure was urged.

The Seventeenth Amendment was submitted to the legislatures of the several states by a resolution of Congress passed May 16, 1912, and announcements of their ratifications came in so rapidly that May 31, 1913, the Secretary of State, William Jennings Bryan, made proclamation that by the approval of the legislatures of three-fourths of the states the election of Senators by direct vote of the people had become a part of the Constitution.<sup>1</sup>

## REFERENCES

---

The bibliography of this movement for the popular election of Senators became very voluminous, as indicated in the following:

*Election of United States Senators by the People, List of Principal Speeches and Reports made in Congress, to June 12, 1902.* 57th Cong., 1st sess., S. Doc. 406. 36 pp.

*Election of Senators.* A collection of reprints, with full bibliography, to 1909. Compiled by C. E. Fanning.

*The Election of Senators.* G. H. Haynes. Analyzes the discussion of this subject in Congress and in current literature to 1905.

As this chapter of our constitutional development is now closed, it is desirable to indicate here only a few of the more notable contributions to the long debate.

In the earlier decade of its discussion in the Senate effective speeches were made in favor of popular election of Senators by

John M. Palmer (Ill.), Feb. 18, and April 12, 1892; June 5, 1896. (*Cong. Rec.*, XXIII, 1267-70; 3201-04; XXVIII, 6159-61.)

David Turpie (Ind.), Dec. 17, 1891 (*ibid.*, 76-80); Dec. 6, 1894 (73-76); March 23, 1897 (169-73).

What Senator Rayner later described as 'perhaps the most formidable speech that was ever made in this body against submitting this question to the people,' was that of Senator Hoar, April 3, 6, 7, 1893. (*Ibid.*, 67, 97, 101-10.)

<sup>1</sup> *Rules and Manual of United States Senate* (1923), 407, gives dates of action by the several legislatures.

In the debates of 1911 Senator Borah was the foremost champion of the amendment. His speeches, along the lines of the report which he presented from the Judiciary Committee, are worth especial attention. (*Ibid.*, 1103-07. Jan. 19, 1911; 2645-46, Feb. 16, 1911; 1884-92, June 12, 1911.) Senator Bristow presented an able argument (Feb. 9, 1911, *ibid.*, 2179 ff.) Senator McCumber discussed the question judicially, voting for the amendment because he believed the state legislatures should be given an opportunity to debate and decide the matter, but making shrewd forecast of some of the unsatisfactory results likely to come from popular election. (June 12, *ibid.*, 1879-83.)

Of the speeches in opposition that of Senator Lodge deserves attention (Feb. 6, 1911, *ibid.*, 1976-80), but by far the strongest is that of Senator Root (Feb. 10, 1911, *ibid.*, 2241-46).





# IV

---

SENATE CONTROL OVER ELECTIONS AND MEMBERS

---

---

★

The people of the United States may justifiably think that the States has sent to Congress an unfit man, who could add nothing to its deliberations, and whose influence may well be pernicious. None the less, the State has the right to send him. It is its sole concern, and to nullify its choice is to destroy the basic right of a Sovereign State, and amounts to a revolution.

JAMES M. BECK

The Senate must do justice not only to the State of Illinois but to the United States of America.

SENATOR JAMES A. REED

Going into the room of the Committee of Elections, of which he was a member, Thaddeus Stevens found a hearing going on. He asked of his Republican colleagues what was the point of the case. 'There is not much point to it,' was the answer. 'They are both damned scoundrels.' 'Well,' said Stevens, 'which is the Republican damned scoundrel? I want to go for the Republican damned scoundrel.'

CONGRESSMAN GEORGE F. HOAR

---

★

# IV

---

## SENATE CONTROL OVER ELECTIONS AND MEMBERS

---

### CONTESTED ELECTIONS TO THE SENATE

---

Each House shall be the judge of the Elections, Returns and Qualifications of its own Members. (Constitution, art. I, sec. 5, par. 1.)

To THE proposition that each House shall be made the judge of the elections, returns, and qualifications of its own members there seems to have been no protest in the Federal Convention. It was the then prevalent mode of settling contests over such matters in the legislatures of the several states. Although in England the cognizance of election disputes was originally vested in the King and his Council, the Commons had intervened in such contests as early as 1384; in 1604 vigorous protest was made against the attempt of James I to transfer the decision of such cases to his Court of Chancery;<sup>1</sup> and in 1702 the Commons passed resolutions affirming that 'the determination of the right of election of Members to serve in Parliament is the proper business of the House of Commons, which they would always be jealous of, and this jurisdiction of theirs is uncontested.'<sup>2</sup>

<sup>1</sup> 'A Form of Apology and Satisfaction to be delivered to the King,' par. 6. Quoted in Taswell-Langmead, *Constitutional History of England*, 459-61, 9th ed., 1929.

<sup>2</sup> *Ibid.*, 350. The evils which presently developed from the partisan character of this method of determining election contests were 'somewhat remedied by the Acts of Mr. Grenville, 1770, and of Sir Robert Peel, 1839. At length, in 1868, the trial of controverted elections was transferred to the Judges of the superior Courts of Law (31 and 32 Vict., c. 125), thus recurring to the method adopted more than 450 years previously in the Election statute of 11 Henry IV.' For further comment on the Commons' dealing with election contests, see Stubbs, *Constitutional History of England*, III, 423-24; Hannis Taylor, *The Origin and Growth of the English Constitution*, II, 472-73; De Alva S. Alexander, *History and Proceedings of the House of Representatives*, 327-28; Robert Luce, *Legislative Procedure*, 192-95; W. R. Anson, *Law and Custom of the Constitution* (1922), I, 115, 178-82.

British practice, by provisions of statutes of the latter half of the nineteenth century, may be summarized as follows: 'The trial of disputed elections is confided to

For eighty years and more of the Senate's history, any question requiring preliminary investigation or determination in regard to the validity of a claim to a seat in the Senate was referred to a special committee<sup>1</sup> or to the Committee on the Judiciary. Perhaps because

two judges of the King's Bench Division of the High Court, who are so appointed that it is impossible for the Legislature or the Executive to influence their selection. But the decision and action to be taken upon it are not matters for the Judiciary. They are retained, if only as a matter of formality, by the House of Commons. When, therefore, the judges have reached their decision, they certify it to the Speaker; whereupon the certificate is ordered to be entered in the Journals of the House and the necessary directions are given by the House for carrying the decision into execution. In the result the House of Commons retain the form of jurisdiction, while the substance of it is in the Judiciary.' Cecil S. Emden, *Principles of British Constitutional Law* (1925), 52, citing Parliamentary Elections Acts of 1868 and 1879, and Supreme Court of Judicature Act of 1881.

There have been various proposals in Congress that, following the more recent English practice, the decision of election cases be referred to some court, at least for preliminary determination; e.g., the bill introduced May 27, 1924, by Congressman F. W. Dallinger (H.R. 9493). It provided that an intending contestant for a seat in the House make application to the Court of Appeals of the District of Columbia to determine the question of his right to such seat, pending final decision of the contest by the House. The court would establish rules of procedure for its expeditious determination of the contest. Its findings 'shall not be subject to appeal or judicial review. . . . Nothing herein contained shall be construed or intended to restrict or in any way impair the right of the House to judge of the elections, returns, and qualifications of its members.' Greater speed in conducting the investigation with the avoidance of 'paying two salaries for one seat' and a more judicial procedure were among the advantages claimed. The bill was framed by two Congressmen who had had long and painstaking service on House Election Committees. The questions which the proposal first suggests are: (1) Would the court accept this task? (2) Would the House in general accept the court's findings as the basis for making its own 'constitutional' determination of the contest? Little interest has been manifested in such proposals in the Senate, where election contests have been fewer, and — in the main — their determination less partisan than in the House. (Letter of Congressman Dallinger to the writer, Dec. 9, 1925.) The proposal is appraised with approval by Robert Luce (*Legislative Assemblies*, 204). Speaker T. B. Reed, in 1890, keenly analyzed the problem and suggested the remedy. His study is as timely today as when it was written: 'Our present method of determining election cases is unsatisfactory in results, unjust to members and contestants, and fails to secure the representation which the people have chosen. In addition, it is costly to both the parties interested and to the people of the country, and is costly not only in money, but in time of the legislative body.' He summarizes the changing methods by which elections to the House of Commons have been determined, but concludes: 'We could not divest ourselves of our right to be the judges of elections even if we would, nor would any statute enacted by both houses serve the purpose. The election laws which we now have do not bind us except by our own consent. Yet in practice they do bind us; and here may be the solution of our difficulties. There is probably no doubt that, if some tribunal were selected by Congress and its decisions were acquiesced in for a few years, there would spring up such a consensus of opinion that ever afterwards the House would cease to do more than record the decisions established in part by itself, or, to speak more accurately, by its predecessor and by Congress. Any law which made the decision *prima facie* would certainly be respected and would certainly work the cure.' 'Contested Elections,' in *North American Review* (July, 1890), 112-20.

<sup>1</sup> Such a committee was appointed for the first time Dec. 11, 1793 (*Annals of Congress*, I, 19), in connection with the election of Albert Gallatin. In that case open sessions were first tried, under a resolution of Feb. 11, 1794, 'That the doors of the Senate be opened, and continued open, during the discussion upon the contested election of Albert Gallatin.' (*Ibid.*, 43.)



of the perplexing electoral problems arising out of Reconstruction, in 1871 for the first time there was created a standing Committee on Privileges and Elections. It consisted of seven members; two years later this number was raised to nine. In 1936 its membership was seventeen, twelve from the majority and five from the minority party.

#### THE HANDLING OF CREDENTIALS

The rules of the Senate make the presentation of the credentials of a Senator-elect a matter of high privilege, and insist that all questions and motions arising or made in connection therewith shall be proceeded with until disposed of.<sup>1</sup> At the beginning of a new Congress, the Presiding Officer lays before the Senate the credentials and other papers relative to the election of Senators received since the adjournment of the Senate. If a newly chosen Senator's credentials are received in mid-session, they are usually presented by his colleague, if he is present and desires to do so.<sup>2</sup>

At the opening of a new Congress it was long the custom to adopt a resolution that the credentials of Senators-elect in disputed or contested cases lie upon the table till the following day, the oath of office being at once administered to those Senators on whose credentials there was no question. But this gave way to a different procedure which Senator Hoar, March 5, 1903, set forth as follows:

The orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators is that when any gentleman brings with him or presents a credential consisting of the certificate of his due election from the executive of his state, he is entitled to be sworn in, and all questions relating to his qualifications should be postponed and acted upon by the Senate afterwards.

If there were any other procedure, the result would be that a third of the Senators might be kept out of their seats for an indefinite time on the presenting of objection without responsibility, and never established before the Senate by any judicial inquiry. The result of that might be that a change in the political power of this Government which the people desired to accomplish would be indefinitely postponed.<sup>3</sup>

<sup>1</sup> Rule VI, cl. 1. Paragraph 2 of this rule requires the Secretary of the Senate to keep a record of these certificates, and of other data relating to the election of Senators.

<sup>2</sup> Thus, Townsend (Mich.), Dec. 14, 1918, presented the credentials of Newberry, who was not to take his seat till March 4, 1919. A motion to refer the credentials to the Committee on Privileges and Elections led to a heated debate as to whether the Senate in the 66th Congress had any jurisdiction over the right to a seat in the 67th Congress. It was stated that by non-partisan vote the committee had decided 'that this matter should not be investigated by this Congress.' After this debate, Townsend withdrew the certificate.

<sup>3</sup> In support of this holding, that Senators presenting credentials in regular form be admitted as *prima facie* entitled to their seats, see the following, in *Senate Election*

In many later contests these words of Hoar have been cited as the most weighty exposition of 'the orderly and constitutional procedure.' As a matter of fact, in making this statement Hoar twice explicitly declared that, in the absence of the committee's chairman (Burrows) and at his request, this statement was made of what he (Burrows) understood to be the proper procedure. Nevertheless, five years later, when the credentials from the Governor of Maryland had been read certifying that John W. Smith had been duly elected and it was moved that he be sworn, it was Burrows who submitted a substitute motion that the credentials be referred to his committee. In opposing this substitute, Rayner said:

I contend that upon an unbroken line of authority, the credentials being in proper form, the Senator has the right to be sworn in, and the question must go, if at all, to the Committee on Privileges and Elections *after* he takes his oath and is seated in this body . . . I ask the Senator from Michigan to give me a single case where a Senator was ever denied the right to be sworn in when his credentials were proper and were right, or when they were collaterally impeached and he was prevented from taking the oath of office.

The substitute motion was lost by a vote of 28 to 34, and Smith was sworn forthwith.<sup>1</sup>

The same issue was raised, December 5, 1916, when Reed moved that credentials, which had just been read, be referred to the Committee on Privileges and Elections, and announced his intention to make a similar motion in reference to all credentials presented. Smoot, citing the above statement made by Senator Hoar at the time when his (Smoot's) credentials were presented, declared: 'There was no objection to that statement. That was the procedure followed at that time.' The motion to refer the credentials was rejected by a decisive vote, 32 to 44, and the precedent upon this point seemed to have been firmly established.<sup>2</sup> Ten years later, however, two claimants bearing credentials in proper form were not allowed to take the oath of office.<sup>3</sup>

For a century and a quarter credentials or certificates of election or

*Cases*, 1913: Potter v. Robbins (179); Graham N. Fitch (244); George Goldthwaite (384); L. Q. C. Lamar (634); P. B. S. Pinchback (538); J. T. Morgan (636); Lafayette Grover (661); Nathan B. Scott (888); Reed Smoot (928); J. W. Smith (996). The same opinion was upheld November 18, 1918, by both Lodge and Underwood.

<sup>1</sup> *Cong. Rec.*, 3954, March 26, 1908.

<sup>2</sup> *Ibid.*, 11-12, Dec. 5, 1916. But note cases of Smith and Vare, pp. 144 ff.

<sup>3</sup> For debate on the proper handling of credentials, see *Cong. Rec.*, 1338, Jan. 10, 1927, and 5513, March 3, 1927; also, discussion of the Smith and Vare cases.

appointment came to the Senate in such form as seemed fit to the individual governors sending them.<sup>1</sup> But after the Seventeenth Amendment had been ratified, the Senate, by resolution of August 20, 1914, ventured to suggest 'convenient and sufficient forms of certificate of election of a Senator or the appointment of a Senator' and provided that copies of 'these suggested forms' be sent to the Governor of each state in which an election is about to take place or an appointment is about to be made 'in season that they may use such forms if they see fit.'<sup>2</sup>

May telegraphed credentials be accepted as valid? This novel question was raised in the Senate, January 10, 1930, when Senator-elect Robsion presented himself to take the oath on the basis of a telegram sent by the Governor of Kentucky to the President of the Senate. Borah opposed establishing such a precedent, and his opposition resulted in postponement of the oath-taking until the signed official document should be received.

#### INVESTIGATION BY COMMITTEE

When a contest is entered or charges are preferred against a Senator's right to his seat, a resolution is introduced, sometimes by the accused member, himself, providing that his credentials and all memorials or other documents bearing upon the issue be referred to the Committee on Privileges and Elections, with authority to investigate the charges — to conduct hearings, summon witnesses, employ stenographers, and incur other necessary expenses. If this resolution is reported favorably from the Committee to Audit and Control the Contingent Expenses of the Senate and if it is adopted by the Senate, the chairman appoints a subcommittee, ordinarily of five,

<sup>1</sup> For a time in 1913 the Vice-President by general order referred all certificates of election of Senators to the Committee on Privileges and Elections upon his own theory that under the Seventeenth Amendment, just ratified, when Senators were elected by the people, it was the duty of the Committee on Privileges and Elections rather than the duty of the officers of the state to determine whether the Senator was elected and the credentials were in proper form. That was before the Senate had adopted the 'suggested forms' mentioned above. Statement of Vice-President Marshall, Dec. 14, 1918.

<sup>2</sup> *Senate Journal*, 472, Aug. 20, 1914. *Standing Rules of the Senate*, Rule VI, cl. 2, n. 1. The form of certificate of election is as follows:

To the President of the Senate of the United States:

This is to certify that on the       day of 19       , A       B       was chosen by the qualified electors of the State of       a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the third day of January, 19       .

(It is duly attested by the state seal, and by the signatures of the Governor and Secretary of State.)

Note the form of credentials used by Governor Pinchot, in the case of Vare, p. 152.



with bipartisan representation, to make the preliminary investigation. This committee may go to the state in question, or may send thither the Sergeant-at-Arms or his deputy, to take depositions. Hearings before the subcommittee in Washington may drag through months, the printed stenographic reports filling many bulky volumes. The subcommittee's conclusions are considered by the committee as a whole, and its report is then presented to the Senate. Since the same party has control of the Senate and of this frankly political committee, it is but natural that the decisions have generally favored the dominant party; but certainly partisan advantage has not governed election contests in the Senate so almost universally as it did for a century in the House.<sup>1</sup>

#### GROUND'S OF CONTESTS

From the first organization of the Senate to the end of the Sixty-Ninth Congress, 1925, about one hundred and twenty contests over rights to seats in the Senate had come before that body for review. In many of these cases several diverse charges had been made, so that in any attempt to make a systematic classification according to the grounds of the contests the groups would inevitably overlap and blur.<sup>2</sup> A considerable number of them grew out of ambiguities in state laws under which until 1866 the legislatures elected Senators — ambiguities in some cases inherent in the phrases used; in others, involving points which the framers of the laws had not had in view; in

<sup>1</sup> T. B. Reed declared: 'Probably there is not an instance on record where the minority benefited' in the decision of a House election contest. (*North American Review*, vol. 151, p. 114.) George F. Hoar, a member of the House Committee on Elections in 1873, and later for many years chairman of the similar committee in the Senate, acknowledged that in the House, 'whenever there is a plausible reason for making a contest, the dominant party in the House almost always awards the seat to the man of its own side.' (*Autobiography of Seventy Years*, I, 268.) De Alva S. Alexander (*op. cit.*, 324) asserts: 'Of these three hundred and eighty-two contests submitted up to and including the 59th Congress [1907], only three persons not of the dominant party obtained seats.' For evidence of a more judicial attitude on the part of the House and its committees in recent years, see statement by Congressman F. W. Dallinger, May 18, 1920, as to five contests in the 65th and 66th Congresses in which unanimous reports favored the minority contestants, and in every case the House accepted the judgment of its committee.

<sup>2</sup> No two students would agree upon such a classification. From a somewhat careful study of the abstracts and debates, the writer concludes that the grounds upon which most of these contests were based might be roughly grouped as follows: (a) mere technicality, 16; (b) fraud, bribery, or corruption in the election, 14; (c) serious irregularities, other than fraud, bribery, or corruption, 17; (d) Reconstruction tangles, 17; (e) alleged crimes or misdemeanors not directly connected with the election, 6; (f) interpretation of 'qualifications,' 7; (g) right of Governor to fill vacancy by appointment, 23; (h) autocratic or illegal action by the presiding officer.



others, involving mere technicalities seized upon by the contestant in the hope that personal or party loyalty might secure a decision in his favor. The law of 1866 was intended to remove many of the ambiguities and prevent irregularities, but some of its provisions proved prolific of contests. Such questions as these gave trouble: Must the date of the first balloting be the second Tuesday after the meeting or after the organization of the legislature? What constituted a 'majority' in each house? In calculating the majority, what was the effect if some members merely answered 'Present'? If the election was thrown into joint assembly, was it necessary that a majority of each house or only a majority of the aggregate membership of the two houses be present and participate in the election? <sup>1</sup> Might the legislature elect a man to fill a vacancy before the vacancy actually occurred? <sup>2</sup> What would be the form of credentials, and by what official signatures were they to be attested? In judging of the 'returns' of its members, might the Senate inquire into the validity of the election of members of the electing legislature? In several cases it was held that the Senate had no authority to pursue such an inquiry.<sup>3</sup> On the other hand, in Reconstruction days the Senate repeatedly passed upon the question, which of two or of three bodies was the valid legislature of a state. In one instance a claimant's right to a seat in the Senate was admitted, although the 'legislature' which elected him had subsequently ceased to have any existence, 'leaving not a resolution, or act, or other thing which has ever been recognized as authoritative, or which has been claimed to be valid, save only the pretended election' of the Senator in question.<sup>4</sup>

#### BRIBERY AND CORRUPTION

Bribery and corruption have been charged in some fifteen cases, sometimes as the main charge, sometimes alleged in connection with fraud. These cases have been handled as controversies over the legality of the individual Senator's election, although repeatedly the question has been raised whether the proper procedure should not be for his expulsion.

Nearly seventy years had passed before a Senator's election was

<sup>1</sup> N. B. Scott, *Senate Election Cases*, 888, and many other cases.

<sup>2</sup> J. A. Hemenway, *ibid.*, 993.

<sup>3</sup> George Goldthwaite, *ibid.*, 384; *Ady v. Martin* (812); *Addicks v. Kenney* (875).

<sup>4</sup> From the views of the minority in *Spofford v. Kellogg*, *Senate Election Cases* (1913), 585. Nov. 26, 1877; Committee Report, March 22, 1880, *ibid.*, 604.

formally challenged upon these grounds, and but one Senator has lost his seat by vote of his colleagues declaring that his election had been procured by bribery or corruption. This statement, however, gives a better impression than the facts warrant. For three other Senators have resigned rather than face a vote which was almost sure to declare their elections invalid.<sup>1</sup> Moreover, the Senate has found no warrant for investigating and no warrant for punishing corrupt practices by or on behalf of a candidate who does not secure enough votes to claim an election. Senate investigations, therefore, have not included many of the most flagrant instances of corruption in senatorial contests like those in Delaware in the years when Addicks was trying to buy a seat in the Senate. The scope of the Senate's action has been still further narrowed by self-imposed restraints which have given some basis for the charge that it has shown a greater disposition to palliate than to punish such offenses.

The first of these unsavory cases was that of Simon Cameron, whose title was challenged in 1857 by certain members of the Pennsylvania legislature who charged that his election had been procured by 'corrupt and unlawful means.' The Senate Committee on the Judiciary, to whom the investigation was referred, reported that 'the allegation was entirely too vague and indefinite'; that it was not proper for the Senate 'to send out a roving commission in search of proofs of fraud in order to deprive one of its members of a seat to which he is *prima facie* entitled'; that until the complainants, who were armed with ample powers of investigation, should take such action, the committee could 'see no reason for initiating any proceeding on the subject.' At their request, they were discharged from further consideration of the case, although Pugh, a member of the committee, protested that when direct charges came from so responsible a source and when the honor of the Senate and the security of the Government were concerned, no rule of a merely technical character, applicable as between individuals, should prevent a thorough investigation of the case.<sup>2</sup>

During the decade from 1870 to 1880 — a period of suspicion and of loose accusation — seven Senators were formally charged with bribery or corruption, but in five cases the committees' reports and the prompt and overwhelming votes by the Senate leave little doubt that the accusations were not substantial. In some instances the committee frankly declared that a grave injustice had been done to the

<sup>1</sup> Alexander Caldwell, 1873; William A. Clark, 1899; Truman H. Newberry, 1922.

<sup>2</sup> *Senate Election Cases*, 264-66.

accused by the consideration which had been given to such vague charges.<sup>1</sup> On the other hand, in the case of Alexander Caldwell (Arkansas, 1872), the committee reported that the evidence of corruption 'went to the validity of the election and had the effect to make it void.' A minority believed that the penalty should be expulsion. After long debate on the resolution declaring that he 'was not duly and legally elected,' before a vote was taken he resigned his seat.

In the case of John J. Ingalls (Kansas, 1879), the Senate took no further action after its Committee on Privileges and Elections had reported that, though bribery had been used by his supporters, it was not proved that he was a party to such vote-buying, nor that enough votes had thus been influenced to determine the election.<sup>2</sup> In the case of Henry B. Payne (Ohio, 1885), memorials from many sources, alleging that his election had been procured by bribery and fraud, were referred to the Committee on Privileges and Elections. By a large majority the committee decided to curtail very narrowly the scope of their evidence taking. They accepted without dissent the committee's rulings in the Ingalls case — which have been cited in every subsequent contest where bribery was involved — that, to deprive a sitting member of his seat, the Senate must be satisfied by legal evidence that he was personally guilty of the corrupt practices, or that the corruption took place with his sanction and encouragement, or else that a sufficient number of votes was changed by the fraud or corruption to affect the result and to insure an election which would not otherwise have been obtained. In view of the offer by responsible parties to substantiate charges of the gravest moment, Frye and Hoar, two Republican members of the committee, earnestly protested against the refusal to pursue the investigation further, claiming that the precedent would be most unfortunate if the Senate should show itself unwilling to make inquiry for its own protection when the honor of one of its members was so seriously impugned.<sup>3</sup> But by a vote of 44 yeas to 17 nays the Senate adopted its committee's recommendation

<sup>1</sup> Pomeroy, Kan., 1872 (*Senate Election Cases*, 426-43); Clayton, Ark., 1871 (444-80); Bogy, Mo., 1873 (609-10); Spencer, Ala., 1873 (611-33); Grover, Ore., 1877 (661-69). Unsubstantial seem to have been the bribery charges in the later contests of Watson and Chilton, W.Va., 1911 (*ibid.*, 1159-64). Bribery charges figured in the contest which resulted in the seating of Kellogg, La., 1877-80 (*ibid.*, 567-608).

<sup>2</sup> *Ibid.*, 692-96.

<sup>3</sup> Pugh, who in almost identical language had protested against the shutting-off of investigation in the Cameron case, now headed the list of those advising no further investigation. For summary of damaging evidence, G. H. Haynes, *Election of Senators*, 57-59.



that no further investigation of the charge involving Payne's title to his seat be made.<sup>1</sup> Similarly, in 1898, the Senate accepted its committee's recommendation that no further investigation be made of bribery charges against Marcus A. Hanna, inasmuch as no prosecution had been instituted in Ohio.<sup>2</sup>

On the day when William A. Clark took the oath as Senator from Montana, March 4, 1899, there were filed against him bribery charges which were at once referred to the Committee on Privileges and Elections. A statement filed by Clark with this committee showed his own 'personal disbursements' in connection with the election exceeding \$140,000. The committee's report specifically declared that he had obtained more than a majority of his apparent majority through illegal and corrupt practices, and that 'The Senate should, as a duty to itself and to the country, demonstrate by its action in this case that seats in the United States Senate procured as Senator Clark's has been procured cannot be retained by the deliberate judgment of the Senate.' They therefore unanimously recommended the Senate's adoption of a resolution declaring that Clark 'was not duly and legally elected'; and urged its prompt passage, saying that the Senate 'owes a duty to the people of Montana,' and that 'Montana has a right to expect a prompt and decisive remedy from the action of the Senate upon the report of this Committee.'<sup>3</sup> While this report was under debate in the Senate, in a vigorous speech in his own defense Clark announced that he had sent his resignation to the Governor of Montana, and that he wished to submit the matter to the people of his state.<sup>4</sup> How the people of Montana appreciated the remedy which they 'had a right to expect from the Senate' was evidenced four months later by the Democratic state convention's unanimously

<sup>1</sup> The decision had a partisan color to the extent that not one Democrat voted against Payne's claim; of those who voted to stop investigation of the charges the Democrats exceeded the Republicans more than two to one. *Senate Election Cases*, 700-18.

<sup>2</sup> This Senate action was doubtless influenced by the fact that when the report was under consideration Hanna — who had first been elected to fill a vacancy — had already been re-elected by the Ohio legislature for a full term. *Ibid.*, 878-87.

<sup>3</sup> When Mark Hanna got himself elected United States Senator by the Ohio legislature, he received a telegram from impudent and malicious Senator Chandler: "Congratulations on your great victory for sound money. How much?" *Boston Herald* editorial, Dec. 29, 1930.

<sup>4</sup> Two minority members agreed to the resolution, but filed their protest to the general conduct of the investigation, insisting that the committee 'was bound by, and ought to act on, the ordinary rules of evidence,' whereas 'hearsay' evidence had been received 'constantly, and in great volume.'

<sup>5</sup> May 15, 1900. The Governor at once appointed Clark to fill the vacancy, but he did not present this credential, and the seat remained vacant till after his re-election.



adopting a resolution demanding his re-election. January 16, 1901, the legislature sent him back to the Senate, where he served his full term despite the fact that by resolution and speech in the Senate Clark had been declared to be personally responsible for the offenses which had been set forth in the committee's report.<sup>1</sup>

#### THE LORIMER CASE: THE DOCTRINE OF RES ADJUDICATA

In 1909 William Lorimer was elected to the Senate by the Illinois legislature on the ninety-ninth ballot. A year after he had taken his seat, at his own request the Committee on Privileges and Elections was instructed to investigate charges that his election had been secured by bribery. Six months later the committee reported: 'In our opinion the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by use or employment of corrupt methods or practices.' This was signed by ten members of the committee. Senator Beveridge alone dissented, holding that there was conclusive testimony that ten votes — four more than enough to invalidate the election — were tainted. He contended: 'If Senators believe that he knew and countenanced a single act of bribery we need not conclude that we must expel him by a two-thirds vote. We need only to conclude that his election was invalid and so declare by a majority vote.'<sup>2</sup> One other member of the committee, Frazier, agreed with Beveridge that the votes of the three accused of being bribe-givers should not be held 'free from taint or corruption' — the view which the majority of the committee had taken on the ground that there was no evidence that those bribe-givers were themselves corruptly influenced to give their own votes for Lorimer.<sup>3</sup> The accused Senator did not take the stand as a witness to deny any knowledge or sanction of corrupt practices, though he did make four prepared speeches in the Senate.<sup>4</sup> The test vote came on the Beveridge resolution, declaring that Lorimer was 'not duly and legally elected.' Party lines were greatly blurred. The resolution was defeated by a vote of 40 yeas and 46 nays.<sup>5</sup> Three days later the Sixty-First Congress adjourned *sine die*, without the Senate's having taken further action.

Hardly a month had passed when the whole controversy was reopened. The Sixty-Second Congress had been convened in special

<sup>1</sup> Resolution and speech of W. E. Chandler, March 2, 1901, *Cong. Rec.*, 3420-35. *Senate Election Cases*, 906-27.

<sup>2</sup> *Senate Election Cases*, 1017-23.

<sup>3</sup> *Ibid.*, 1024.

<sup>4</sup> *Cong. Rec.*, XLVI, 648; 3113-24; 3645-46; 3757.

<sup>5</sup> March 1, 1911.

session. Instigated by a resolution introduced by La Follette, on the ground that new and material evidence had been produced by a committee of the Illinois legislature, the Senate ordered that an investigation of the charges against Lorimer be made by a committee consisting of eight designated members of the Committee on Privileges and Elections.<sup>1</sup> Nearly a year passed before the committee report, signed by five of its members, was presented.<sup>2</sup> They insisted that in sitting upon the question of a Senator's title to his seat the Senate was not acting in a legislative capacity.

The Senate acts in this matter in a judicial character and its decision is of the same nature as the decision of any regularly constituted court of justice, and has the same force and effect. We are here exercising a judicial function. This being true, the doctrine of *res adjudicata* applies in this case.

They declared that, after a full investigation, the Senate had already passed upon Lorimer's title, and that, in accordance with the rules of law, judicial procedure, and justice, that action should be held conclusive and final, unless new and convincing evidence were produced, establishing corruption in his election. Even if it were held that the Senate's former judgment could be reconsidered and vacated, they declared that they could find in all the testimony submitted no evidence that Lorimer was personally guilty of any corrupt practices in securing his election or had any knowledge of such practices. In short, the report declared that his election was 'the logical result of existing political conditions in the State of Illinois, and was free from any corrupt practice.'

On the same day there was submitted a minority report, signed by three members of the committee.<sup>3</sup> These held that the doctrine of *res adjudicata* did not apply in this case, inasmuch as the Senate had deliberately adopted a resolution reopening the case for a complete investigation of the facts. They asserted that the testimony taken in this reinvestigation established the contention that at least ten votes — his majority in the joint assembly was fourteen — had been purchased for the purpose of electing Lorimer, and that 'the record reeks and teems with evidence of a general scheme of corruption.' They submitted a resolution declaring that Lorimer's election was invalid.

<sup>1</sup> June 7, 1911.

<sup>2</sup> May 20, 1912. Republicans: Dillingham, Gamble, Jones; Democrats: Johnston, Fletcher. *Senate Election Cases*, 1031-87.

<sup>3</sup> Kenyon, Republican; Kern and Lea, Democrats.

For two months, from time to time, this resolution was under debate, during which Lorimer, himself, made three prepared statements. July 13, 1912, it was adopted, the roll-call showing 55 yeas to 28 nays.<sup>1</sup>

<sup>1</sup> *Senate Election Cases*, 1113. Gives full references to Senate debates.

*The Doctrine of Res Adjudicata in Senate Election Cases:*

The applicability of this doctrine was fully summarized in the reports on the Lorimer case. (*Ibid.*, 1062-72; 1100-02.) The following are the precedents:

1. *Fitch and Bright*.

In the second session of the 35th Congress an attempt was made to secure a reversal of the decision made in the first session, whereby these two men had been seated. Feb. 14, 1859, the Senate agreed to its committee's report, that the judgment first rendered by the Senate 'was final and precluded further inquiry into the subject.' Vote, 30 to 15. (*Ibid.*, 244-60.)

2. *Sykes v. Spencer*.

A report that the question could not be reopened, and must be treated as *res adjudicata* (May 20, 1876) was not acted upon by the Senate. (*Ibid.*, 611-33.)

3. *Corbin v. Butler*. (*Ibid.*, 637-60.)

4. *Spofford v. Kellogg*. (*Ibid.*, 589-605.)

These two cases both arose out of Reconstruction controversies, during the very months when Federal troops were being withdrawn from the Southern states. Both cases were before the Committee on Privileges and Elections at the same time, both were debated in the Senate on the same days, and at various stages each called forth tie votes. After much negotiation, by unanimous consent agreement debate was limited and a vote secured on both cases on the same day, with the result expected from the dicker, that a Democrat (Butler) from South Carolina and a Republican (Kellogg) took the oath as Senators Nov. 30, 1877.

Nevertheless, at the next session of the same Congress a petition from the original S.C. contestant, Corbin, for a reconsideration of his claim was referred to the committee, which reported, Feb. 4, 1879, that he was entitled to the seat. To this the Democrats on the committee vigorously dissented, declaring: 'The jurisdiction is the same; the facts are the same; the parties are the same; the subject matter of the contest is the same and the questions of law are the same. The petition now before us is a mere, sheer, naked proposition that the Senate at a subsequent session shall revote on the identical questions, facts and issues on which the Senate voted and decided at a former session.' (*Ibid.*, 658.) By a vote of 25 to 36 the Senate decided not to proceed to a consideration of Corbin's claim.

The Louisiana contestant was shrewd enough to bide his time until a new Congress had been convened, in whose Senate the 'reconstructed' states had 18 Democrats as compared with 12 in the previous one, and but two Republicans as compared with five. In the reorganization of the Senate, the Democrats gained control of the Committee on Privileges and Elections. After considering Spofford's petition for a year, this committee brought in a long and scathing report. Acknowledging that a decision rendered on its merits ought not afterwards to be reviewed on light or even doubtful grounds, they nevertheless declared that 'under the most technical rule of *res adjudicata* there is not a court in civilized Christendom which would hesitate to review and reverse a judgment so utterly unauthorized and unjust.' (See furious arraignment of the 'Packard legislature' which had 'elected Kellogg,' but had done nothing else 'ever claimed to be valid.' *Ibid.*, 604.)

Upon Senator Hoar's advice, the minority in the committee declined to follow the Democrats into the discussion of the evidence; and put the case alone and squarely on the authority of the previous judgment of the Senate. (*Autobiography of Seventy Years*, II, 106-07.) They declared: 'The party majority in the Senate has changed since Mr. Kellogg took the oath of office in pursuance of the above resolution — of Nov. 30, 1877. . . . Nothing else has changed. The facts which the Senate considered and determined were in existence then as now. It is sought by mere superiority of numbers for the first time, to thrust a Senator from the seat which he holds by virtue



This is the only instance in the Senate's history where, despite the invoking of the doctrine of *res adjudicata*, a member's claim to his seat was reconsidered by the Senate of the Congress following that in which his right had been affirmed, with the result that his election was then declared to have been invalid. The Senate is said to be 'a continuous body,' but this overwhelming reversal represents something far different from the matured judgment of the same bench of 'judges,' enlightened by more extended investigation. In the seventeen months which intervened between the two votings the personnel of the 'court' had radically changed. Of those who had formerly voted against Lorimer, seven were no longer members of the Senate, while of those who had voted for him thirteen had now disappeared. New members contributed twenty-one votes against him and only two to his support.

The summaries of the evidence in the Lorimer case abundantly bear out the conclusion that his election — as the first majority report phrased it — was 'the logical result of existing political conditions in the State of Illinois.' Month by month more of that sordid mess had been exposed. Its existence was resented — by the country at large, it may be, more than by Illinois — as a menace and a dis-

of the express and deliberate final judgment of the Senate.' Although the majority report had declared that at the previous hearing not one witness had been examined, whereas in this hearing 'nearly 150 witnesses have been examined making over 1200 printed pages of testimony of the most material and controlling character,' the minority report, drafted by Senator Hoar, dismissed this mass of evidence as 'not only unworthy of respect or credit but as wholly irreconcilable with undisputed facts.' For seventeen days the majority's resolution was under debate, but in the last week of the session, June 11, 1880, it was postponed, never to be revived. Kellogg, the Republican, thus retained his seat, it may be assumed, less because of a conviction that upon the merits of the case he was entitled to it, or that the evidence did not call for a re-vote despite the doctrine of *res adjudicata*, than from the belief that the Democrats, having received a *quid pro quo* in the seating of Butler, were not now playing the game fairly in trying to use their party majority in a new Congress to unseat a Senator — particularly a man who had previously served four years in the Senate (1868-72).

5. *Henry A. du Pont.* (*Senate Election Cases*, 818-74.)

This case arose out of a technical question as to the right of the acting-governor of Delaware to preside and vote in the Delaware senate, in the electing of a Senator. If he had not that right, du Pont was elected. The Committee on Privileges and Elections reported that du Pont was entitled to a seat in the Senate, but after months of debate, May 15, 1896, the Senate, by a vote of 31 to 30, declared him not entitled to a seat. At the next session a petition for a reconsideration of du Pont's claim brought from the Committee on Privileges and Elections (consisting of the same men who had previously affirmed his title) a unanimous report declaring: 'New Senators have entered the Chamber since the resolution just cited was adopted. Nothing else has changed. . . . The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution the judge of elections, qualifications, and returns of its members, and its judgment is just as binding in law, in all constitutional vigor and potency, when it is rendered by one majority as when it is unanimous.' No further action was taken.



grace. Justly or unjustly, the people had come to call it 'Lorimerism.' The three minority members of the committee, who, though not of the same party, were unanimous in holding Lorimer personally accountable, were all new not only to the committee but to Washington.<sup>1</sup> Each had a career before him in a new forum, and in common with the other new members of the Senate, they knew the strength of the 'anti-Lorimer' sentiment outside the Senate Chamber.

The unseating of Lorimer may have been deserved. In the opinion of the present writer it was deserved. It may have had the salutary effect of deterring some later candidates from the use of dubious methods. Yet a review of this bitter and most protracted election contest can hardly fail to convince the reader that justice is ill served by a procedure which allows the accused for more than three years to remain a voting member of the Senate; which lets perjury go undetermined and unpunished; and which, after a belated and more or less political verdict has been rendered, still leaves the possibility of its reversal to be governed quite as much by the accident of new elections and the play of personal ambitions as by any attempt to secure a judicial determination of the validity of the election in controversy.

#### THE STEPHENSON CASE: CORRUPT PRACTICES IN THE PRIMARY

In 1911 charges of corruption affecting the title of Isaac Stephenson of Wisconsin were referred to the Committee on Privileges and Elections, fifteen months after he had taken his seat.<sup>2</sup> After protracted investigation, nine of the committee joined in a report that the charges against Stephenson had not been sustained, and that his election was not procured by corrupt practices. But the statement of the chairman of the subcommittee which had pursued the investigation in Wisconsin at once disclosed the novel situation that, while the loose charges of corruption in the legislature election were held by the majority of the committee to be 'entirely without foundation,' evidence had been presented of flagrant bribery and corruption used to secure the Republican nomination in the direct primary election. The majority took the attitude:

The mere fact that the legislature of Wisconsin had undertaken to include a senatorial selection within the provisions of its direct primary law, in the absence of power so to legislate, could not affect the validity

<sup>1</sup> Kenyon, Kern, and Lea.

<sup>2</sup> The basis of the action was a joint resolution which had been adopted by the Wisconsin legislature.

of an election by the legislature made pursuant to the national law. . . . It would be entirely within the power of a legislature, charged with the responsibility of electing a United States Senator, to repeal any legislation enacted by a previous legislature which placed a limit upon or directed its action. Hence they found themselves forced to conclude that 'the direct-primary proceedings cannot be held to affect the validity of an election by the legislature.'

Nevertheless, the majority report declared:

The amount of money expended by [Stephenson and the other senatorial candidates] in the primary campaign was so extravagant and the expenditures . . . were made with such reckless disregard of propriety as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of government, which contemplated the selection of candidates by the electors and not the selection of electors by the candidates.<sup>1</sup>

In presenting the views of the minority, five members of the committee declared:

We concur in this statement, and it justifies us in opposing the conclusion of the majority. How a seat in the Senate can be secured 'in violation of the fundamental principles underlying our system of government' with the evidence showing the use of such a large sum of money, and not be tainted by corrupt methods and practices we are unable to comprehend. The question now squarely before the Senate is whether or not methods and practices in 'violation of the fundamental principles of our government' shall be denounced by our words and approved by our votes.

After citing some of the most damaging testimony, the minority members submitted a resolution declaring that Stephenson was not legally elected.<sup>2</sup> After ten days of debate in which many of the ablest Senators took part, this resolution was defeated by a vote of 27 to 29. Senator Lorimer's vote for Stephenson 'was greeted by an outburst

<sup>1</sup> This quotation is from the report of the subcommittee which conducted the investigation in Wisconsin; its report was adopted by the committee, and its chairman was instructed to report the actions of the committee to the Senate. (*Senate Election Cases*, 1114-28 — especially 1128.) Stephenson's expenses in that primary contest were reported to have been nearly \$108,000 — or \$1.89 for every vote cast for him. Other would-be candidates spent amounts averaging from \$0.16 to \$1 for votes. Stephenson's leading manager was said to have had as many as seventy men 'industrially engaged in distributing money among the common people throughout the campaign.' Twenty-five hundred dollars was paid by Stephenson's direction to a state game warden, to be used at his discretion, with no accounting.

<sup>2</sup> The minority were Jones, Clapp, and Kenyon, Republicans; and Kern and Lea, Democrats. Their 'views' present an effective summary of the evidence in the case. *Senate Election Cases*, 1137-54. See, also, the view of Senators Pomerene and Sutherland, *ibid.*, 1129-36.

of laughter from the gallery.’<sup>1</sup> The next day, by a vote of 40 to 34, Stephenson was declared entitled to his seat. High authorities on constitutional law, like Root and Sutherland, in elaborate arguments supported Stephenson’s claim, while Borah, Bristow, and Poindexter opposed it. Though, by the frank acknowledgment of eminent Senators who voted for him, Stephenson had won his nomination by methods and practices ‘in violation of the fundamental principles of our government,’ he continued to hold a seat in the Senate for nearly eight years.

#### THE NEWBERRY CASE: EXCESSIVE EXPENDITURE IN THE PRIMARY CAMPAIGN

On the day following the swearing-in of Truman H. Newberry as Senator from Michigan, May 20, 1919, there was referred to the Committee on Privileges and Elections a petition from Henry Ford contesting Newberry’s election.<sup>2</sup> Nearly two years elapsed before the committee’s report was presented. Meantime the matter at issue had been fiercely fought over in the courts. As a result of indictments brought by a federal grand jury, November 29, 1919, in Michigan, Newberry and eighty-four men who had been connected with his primary campaign were placed on trial. At the outset the judge dismissed a general demurrer to the indictments, and upheld the authority of Congress to regulate not only the election of its members but their nomination as well. The trial lasted ten weeks. Declaring that there was no evidence whatever to sustain the count in the indict-

<sup>1</sup> Press report of March 27, 1912. Lorimer’s own title to a seat had been under challenge for nearly three years, and four months later his election was declared to have been invalid because of bribery and corruption.

<sup>2</sup> The preliminaries to this contest had been absolutely without precedent. Sept. 17, 1918, a resolution was introduced that the Committee on Privileges and Elections be authorized to investigate and report upon a report that by a political campaign committee in Michigan more than \$175,000 had been expended in the campaign (ending in the primary election of Aug. 27, 1918) for the nomination of a candidate for United States Senator; and also to report what, if any, additional legislation might be necessary in order to further limit the excessive use of money in either primary or general elections. Senator Townsend, Republican, of Michigan, at once protested against the impropriety of introducing such a resolution when the senatorial *election* was still two months off, asserting that it was propaganda, intended not so much to uncover or punish illegal action as to elect Newberry’s opponent. Nevertheless, the resolution was referred. In the ensuing election the votes, as later certified by the Senate Committee, were as follows: Newberry, 220,054; Henry Ford, 212,487; Others, 5911. Upon the presentation of Newberry’s credentials, an immediate motion that they be referred brought protest from the leading Republican parliamentarians, who contended that jurisdiction over the validity of that Michigan election could belong only to the Senate of the Congress whose term was to begin March 4, 1919. Townsend withdrew the Newberry credentials.



ment which alleged corruption, the court refused to permit the jury to consider it. Upon the one count charging conspiracy to expend money in excess of the statutory limit of \$3750, the jury brought in a verdict of guilty against Newberry and sixteen other defendants, and he was sentenced to two years' imprisonment in the penitentiary at Leavenworth and to the payment of a fine of \$10,000 — the heaviest sentence permitted under the law.

An appeal was forthwith taken to the Supreme Court of the United States. Here Charles Evans Hughes headed the counsel for the defense. They contended that the corrupt practices act itself was unconstitutional, so far as it attempted to limit campaign expenditures for legal purposes. Mr. Hughes characterized as 'grotesque' the Government's construction of the law, which was in effect that 'this legal committee, having legally raised a legal sum of money for a legal purpose, became an illegal conspiracy because its candidate was aware that more than \$3750 was being expended.' On the other hand, the Solicitor-General contended that Newberry in becoming a candidate after he had been assured, in conference with the two men whom he later made his managers, that the campaign for the nomination would cost at least \$50,000, entered into a conspiracy to defeat the law — a conspiracy carried forward by his frequent conferences and extended correspondence with the campaign managers in Michigan.<sup>1</sup>

The nine Justices of the Supreme Court were unanimous in their decision that, because of grave injury done to the defendants by the misapprehension and grievous misapplication of the statute by the trial judge in his instructions to the jury, the conviction of Senator Newberry and his sixteen associates must be set aside.<sup>2</sup> As to the

<sup>1</sup> The laws in question were Criminal Code, sec. 37; sec. 8, Act of Congress, approved June 25, 1910 (c. 392, 36 Stat., 822-24); Act of Congress, approved Aug. 19, 1911 (c. 33, 37 Stat., 25-29). Federal law fixed the aggregate sum which a candidate for the Senate might expend or cause to be expended in procuring his nomination as that amount which he might expend or cause to be expended under the laws of his own state, up to a minimum of \$10,000 fixed by federal law. The Michigan law (Act No. 109, sec. 1, Laws of 1913) limited the sum which might thus be expended in behalf of one seeking nomination for the Senate to one-half of a year's salary — hence to \$3750. See letter of C. E. Hughes summarizing the conviction of Newberry as 'wrong and most unjust,' published in *Cong. Rec.*, 1173, Aug. 24, 1922.

<sup>2</sup> *Truman H. Newberry et al., plaintiffs in error, v. The United States of America*, 256 U.S. 232. Reprinted as S. Doc. 10, 67th Cong., 1st sess. The error in the instruction 'plainly resulted from a failure to distinguish between the subject with which the statute dealt — contributions and expenditures made or caused to be made by the candidate — and campaign contributions and expenditures not so made or caused to be made, and therefore not within the statute.' 'Under this view,' said Chief Justice White, 'the greater the public service and the higher the character of the candidate, giving rise to a correspondingly complete and self-sacrificing support by the electorate to his candidacy, the more inevitably would criminality and infamous punishment result both to the candidate and to the citizen who contributed.'



validity of the Federal Corrupt Practices Act in relation to a senatorial candidate's campaign for nomination, the Court divided five to four. Justice McReynolds, presenting the opinion of the Court, held that the federal statute in question was unconstitutional, as Congress had not been authorized to limit the expenditures in a primary or nomination campaign.<sup>1</sup> In his dissenting opinion, Chief Justice White characterized as 'suicidal' the proposition that, 'as the nominating primary is one thing and the election another and different thing, the power of the State as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators.'<sup>2</sup> He contended that the large number of states which had established senatorial primaries 'indicates the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter.'<sup>3</sup> Hence he found it 'impossible to say that the admitted power of Congress to control and regulate the election of Senators does not embrace, as appropriate to that power, the authority to regulate the primary held under State authority.'<sup>4</sup>

<sup>1</sup> The Justices concurring in this opinion were Messrs. McReynolds, Holmes, Day, Van Devanter, and, *with qualification*, McKenna.

The entire history of this celebrated contest is set forth in great detail by Spencer Erwin, in *The Case of Henry Ford vs. Truman H. Newberry* (1936).

<sup>2</sup> The Chief Justice traced the development of the Seventeenth Amendment, showing that after long deliberation the original proposition was changed so as to preserve the complete power of Congress as to regulating senatorial elections, and emphasized the point that, after the Seventeenth Amendment had passed Congress, Congress enacted legislation so that the amendment (to the Corrupt Practices Act dealing with state primaries) might be applied to state senatorial primaries.

<sup>3</sup> Illustrations of the dominance of the primary were cited by the Chief Justice from G. H. Haynes, *The Election of Senators*, 132 and 141, and 259-70.

<sup>4</sup> Mr. Justice Pitney vigorously set forth a similar opinion, in which Messrs. Brandeis and Clark concurred.

In later years the precise meaning of the Supreme Court's decision in this case came often in question, in its bearing on the power of the Senate to investigate and the power of Congress to regulate primary elections. For example, in the debate on the Gould case, December 7, 1926, occurred this colloquy:

Borah: Does the Senator concede that the primary is a part of the election?

Reed (Pennsylvania): I do not. . . Neither does the Supreme Court. Of course the Senator may differ from them. The rest of us will make up our minds —

Borah: No; the Supreme Court has not decided any such proposition.

Reed: What does the Senator construe the Newberry case to mean?

Borah: . . . As to whether a primary was a part of the election system, four judges held that it was, and four held that it was not, and one (McKenna) reserved his opinion on this question; so that question was not decided by the Supreme Court.

For Justice McKenna's reservation as to the power of Congress under the Seventeenth Amendment, see 266 U.S. 258.

In *Nixon v. Herndon et al* (273 U.S. 536), a Texas law providing that 'in no event shall a negro be eligible to participate in a Democratic primary election' was held to be invalid, on the ground that color alone cannot be made the basis of a statute affecting the right to vote. Justice Holmes, who in the Newberry case had sided with those

Within a week after the Supreme Court rendered its decision, Newberry resumed his seat, which had been vacant since the verdict of guilty had been pronounced in the Michigan trial. During the many months while this case had been in the courts, the Senate's subcommittee had been holding hearings and conducting a recount of the nearly 450,000 votes cast in the election. September 29, 1921, the Committee on Privileges and Elections presented its report.<sup>1</sup> All of its members agreed that it was established conclusively that Newberry had received a majority of the votes in the general election, so that Ford had no valid claim. The report concluded with resolutions declaring Newberry to be 'a duly elected Senator from the State of Michigan' and that the charges made against him had not been sustained. Three minority members of the committee submitted a statement, insisting that highly important evidence, which had not been in the record before the Supreme Court, showed conclusively Newberry's active participation in the organization of his committee, after he had been assured that his nomination would cost at least \$50,000, and his approval and direction of many of his committee's activities.<sup>2</sup> They asserted that essential documents had been concealed or destroyed; and that party votes in the committee had balked the minority members' efforts to have Newberry and certain other important witnesses called to testify. Because of the corrupt and illegal practices employed in the primary campaign, they recommended that Newberry's seat be declared vacant.

Newberry had remained silent in the district court and before the Supreme Court, nor had he gone before the investigating committee; but he delivered a prepared address in the Senate, in which he declared that he was not conscious of a single unlawful or corrupt act in his campaign.<sup>3</sup> He asserted that he did not have the faintest idea as to the amount of money that was actually expended until after the report was made public, and that he was 'at once filled with astonishment and regret' on learning that the campaign had cost about \$195,-

who held that Congress had no power to regulate primaries, six years later in giving the opinion of the Court, which was unanimous, said: 'If the defendant's conduct was a wrong to the plaintiff, the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.' (March 7, 1927.) Compare with *Nixon v. Condon*, 286 U.S. 73, in which the primary is again dealt with as a part of the election process.

In his letter (p. 138, n. 1) Mr. Hughes commented upon this point: 'With the holding of the statute unconstitutional in its relation to primary campaigns, the basis of the prosecution of Senator Newberry, with all its sensational incidents, fell.'

<sup>1</sup> *Cong. Rec.*, 7746-74.

<sup>2</sup> Pomerene, King, and Ashurst.

<sup>3</sup> Jan. 9, 1922.

000. 'The amount . . . was more than ought to be expended in any ordinary campaign. But this was not an ordinary campaign.' In the Senate debate Newberry's opponents laid stress on the 'rather flimsy manner' — to use his own phrase<sup>1</sup> — in which he replied to the charge that he had taken part in raising and spending the huge campaign fund; on the inconsistencies between his sworn statements and the later disclosures; and on the disappearance and destruction of expense accounts. Yet it was conceded that most of the objects of expenditure were legitimate — for newspaper publicity and advertising, for hiring halls and speakers in an attempt before a constituency of some 500,000 voters to equalize competition in a political contest between a relatively unknown man and perhaps the most widely advertised man in the United States with a business agency in almost every Michigan hamlet. Conceivably the expenditure of money and effort was no greater than conscientious men might have thought necessary and justified, to prevent the election to the Senate of one whose words and deeds in relation to America's part in the World War had aroused widespread distrust. Nevertheless, it was impossible to get away from the fact that the expenditure of hundreds of thousands of dollars to effect the nomination of a senatorial candidate was 'a peril to republican institutions, no matter who runs the campaign or pays the bills.' Hence, just before the vote, Newberry's supporters felt forced to add to the resolution, which declared him 'duly elected,' amending resolutions that the amount expended had been 'too large — much larger than ought to have been expended' and

that the expenditure of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate and dangerous to the perpetuity of a free government, such excessive expenditures are hereby severely condemned and disapproved.

Senator Borah declared that the passing of the resolution thus amended would in effect say to Newberry: 'You may hold your seat, but you hold it here and sit in the presence of your colleagues and before the people of the world as one who has obtained it in a manner which imperils the very life of the Republic.'<sup>2</sup>

<sup>1</sup> Letter of Aug. 11, 1918, to A. H. Vanderberg, editor, *The Herald*, Grand Rapids, Mich. Newberry's comment, in a letter to his campaign manager, was quoted in Senate debate.

<sup>2</sup> *Cong. Rec.*, 1108, Jan. 12.



Senate Republicans faced an embarrassing decision. It has often been alleged that Newberry's vote in May, 1919, had given them the majority of one, which enabled them to organize the Senate; that but for his dependable support Senator Lodge would not have headed the Committee on Foreign Relations nor Senator Penrose the Committee on Finance; and that a Democratic Vice-President would have had frequent occasion to exercise his casting vote in decisions affecting the Treaty of Versailles. Senator Lodge declared this to be 'wholly untrue.'<sup>1</sup> For the Senate Republicans, with a clear majority of twenty-one in the Sixty-Seventh Congress, 'to confess a flaw in their title in the Sixty-Sixth Congress would have been troublesome historically.' Yet popular clamor was crying aloud for Newberry's exclusion.

Rarely has there been a more complete line-up of Senators than in making this momentous decision. On the resolution declaring him duly elected the vote stood 46 yeas to 41 nays. The only Senators not recorded as voting or paired were: Newberry, Thomas A. Watson, and Hiram Johnson.<sup>2</sup> Every yea vote was cast by a Republican; the nays included fourteen Republicans and seventeen Democrats.<sup>3</sup>

But the end was not yet. In the closing days of the debate, three Republican Senators had warned their colleagues that the passing of the resolution would 'not be the last of the Newberry case.' During the following summer 'Newberryism' figured in state campaigns the country over. Senators seeking re-election who had voted for Newberry were vigorously assailed. In November the returns showed that seven of Newberry's supporters had failed of re-election and that in every case they would be replaced by Senators opposed to him. Of the new Senators at least three were definitely pledged to bring the Newberry case again before the Senate.<sup>4</sup> La Follette, who had launched the resolution which led to the ousting of Lorimer,

<sup>1</sup> In his posthumous book, *The Senate and the League of Nations*, 149-50, Lodge insisted that at the time of organizing the Senate, May 19, 1919, the Republicans had a margin of two votes, and that even 'if the Senate had refused, which they could not have done, to accept the certificate of the Governor of Michigan and declined to have Mr. Newberry sworn, we would have been left with 48 Republican Senators and 47 Democratic Senators.' Note, however, that what Lodge here declares the Senate could not have done is precisely what the Senate did do, seven years later, in the Smith and Vare cases.

<sup>2</sup> Jan. 12, 1922, *Cong. Rec.*, 1116.

<sup>3</sup> Pepper, who had begun service in the Senate only three days before this vote was taken, explained his reasons for voting in favor of Newberry's claim in a letter to the *New York Independent*, which later published a critical comment by Walsh (Mont.). These are printed in *Cong. Rec.*, 3330; 4066.

<sup>4</sup> Brookhart, Shipstead, and Ferris, who succeeded Townsend of Michigan, Newberry's staunch supporter throughout the long contest.



had served notice that he would attempt to reopen the question. It seemed clear that in the first session of the Sixty-Eighth Congress Newberry would face a majority of at least eleven Senators resolved to unseat him. It needed no prophet to read the handwriting on the wall. Within a fortnight after the election Newberry sent to the Governor of Michigan his resignation, to take immediate effect.<sup>1</sup> He declared that the turn of events rendered 'futile further service in the United States Senate' where his work would continue to be 'hampered by partisan political persecution.' Reviewing the various stages in the struggle, he asserted: 'My right to my seat has been fully confirmed, and I am thankful to have been permitted to serve my state and my country, and to have the eternal satisfaction of having by my vote aided in keeping the United States out of the League of Nations.'<sup>2</sup>

The precedent of Lorimer's ousting, ten years earlier, left no doubt what must have been expected had the Newberry case been reopened. That November election had not sent to the Senate a new panel of open-minded jurors, but a group of men eager and ambitious to make their way in politics, many of them under specific pledges to attack the validity of Newberry's election. There may be less menace in the presence of an occasional Newberry in the Senate than in its continuance of a method of dealing with contests which allows the challenged Senator to be sworn if his credentials are formally correct; secures his vote for party purposes for it may be three or four years; interposes delays in investigation; curtails the scope and authority of evidence taking; and leaves the decision of the validity of his title to be upset at any time before the expiration of his six-year term when an adverse majority can be secured in the Senate.

<sup>1</sup> Dated Nov. 18, 1922; presented in the Senate Nov. 21. The following day Spencer (Mo.) took occasion to eulogize Newberry as one 'whose career before the election of 1918, and during that election and since that time in the Senate of the United States has been that of a conscientious, patriotic American, of signal ability and indefatigable diligence.' Senator Borah rejoined: 'I am not quite willing to have the statements of the Senator from Missouri go unchallenged. . . . I think the evidence is quite conclusive that the money was expended both with his knowledge and consent. . . . I think the record is conclusive as to the illegality of the expenditure of the money, and that the amount expended was intolerable. . . . The system of politics which prevailed in his election is indefensible from the standpoint of law or of morals.' *Cong. Rec.*, 31.

Years later, Spencer Erwin came to the defense of Newberry in *Henry Ford vs. Truman H. Newberry* (1935). Its spirit is thus indicated: 'The proceedings against Mr. Newberry are a sermon on ill-considered legislation, defective justice and bad politics' (589-91).

<sup>2</sup> By a singular coincidence the press had announced on the same day (March 20, 1920) that the Treaty of Versailles and America's participation in the League of Nations had been killed in the Senate, and that Newberry had been convicted 'of having conspired criminally in 1918 to violate the election laws.'

The problem of financing senatorial nominations and elections in accord with democratic principles remains unsolved.<sup>1</sup> Effective as popular election of Senators has been in eliminating some of the old abuses, it has not lessened certain other evils. In some respects it has increased the problem's difficulty. Those who now favor the choice of a thoroughly worthy candidate for the Senate no longer have the task of merely appealing for his nomination to several hundred members of a party convention and of urging his deserts upon a few score members of the legislature; — his merits must be brought home to the entire electorate in the primary, and again in the election. In such a race the aspirant whose name has already become a household word enjoys an enormous advantage which the supporters of a less known candidate may find it impossible to overcome, even by the expenditure of hundreds of thousands of dollars to which attaches not the slightest taint of corruption.<sup>2</sup>

'SENATORS,' CERTIFIED AS 'DULY ELECTED,' NOT ALLOWED TO  
TAKE THE OATH: THE SMITH AND VARE CASES

Press reports of November 3, 1926, announced that by clear majority on the preceding day there had been elected to the Senate Frank L. Smith of Illinois and William S. Vare of Pennsylvania. But for months the press had been forecasting that, whatever result the elections might show, neither of these candidates would secure

<sup>1</sup> 'We have made no provision for financing our political campaigns, at a time when the direct primary — the most effective device ever conceived by the mind of man for giving wealth an advantage over poverty — has doubled their inevitable cost and when woman suffrage has doubled it again. And we have passed corrupt practices acts just as if they would settle the question. Legislation warning the influenza away, without any attempt to grapple with the disease, would be just as sensible.' *Boston Herald*, editorial, Nov. 21, 1922.

<sup>2</sup> Popular comment on this contest ran as follows: 'Henry Ford was advertised to the extent which \$10,000,000 would not have bought for Newberry.' The question of violation of statutory limitations aside, 'is it corrupt for one man to use \$200,000 in buying something that the other fellow obtains free of charge, to an extent fifty times as great?'

Chilton v. Sutherland served as a curtain-raiser to the Ford-Newberry contest, for the only charge which the Committee on Privileges and Elections was called upon to investigate was that Sutherland's election was invalid because of expenditures in the primary campaign in excess of the sum warranted under the West Virginia Corrupt Practices Act. The committee presented a unanimous report, setting forth that the act in question had been declared unconstitutional; that, in spite of the charges in relation to the primary campaign, no one had challenged Sutherland's right to go on the ballot in the subsequent election, nor instituted criminal proceedings against him, nor claimed that any of the money had been corruptly spent. The total excess expenditure alleged was \$51.63, and even this amount was in dispute. Without a dissenting vote, the Senate agreed to the committee's recommendation that under the circumstances this small and disputed excess expenditure should not operate to vacate Sutherland's seat. June 29, 1918, 65th Cong., 2d sess., S. Rept. 269.

a seat in the Senate. For in each of these states a Senate special committee<sup>1</sup> had exposed pre-election conditions such that, as one Senator declared:

Mr. Smith and Mr. Vare may have the law on their side, but we have the jury. No man in politics will dare to seat either of them, regardless of the right of the Senate to delve into a state primary.

These two contests were alike in this respect, that in the first instance the basis for challenging their right to seats in the Senate lay in the extraordinary expenditures of money in behalf of these winning candidates in their primary campaigns. In Illinois Senator McKinley, seeking re-election, was said to have placed at the discretion of his attorney for use in the primary campaign \$600,000 of his own money, some \$350,000 of which was actually expended. On the other hand, it was testified that more than \$253,000 was expended on behalf of Frank L. Smith, who won the Republican nomination. Throughout the campaign Smith continued to hold the position of chairman of the Illinois Commerce Commission, despite the facts that almost two-thirds of the money expended to secure his nomination was contributed by Samuel Insull,<sup>2</sup> who was reputed to hold the controlling influence in Illinois public utilities whose values exceeded half a billion dollars, and that more than four-fifths of the Smith campaign fund came from three men who had a direct interest in decisions the Commerce Commission had rendered in the past or might render in the future. It is hardly conceivable that in the days before the ratification of the Seventeenth Amendment a party convention would have dared to nominate, or that a state legislature would have dared to elect, a candidate so vulnerable because of his official relations with the financial backers of his campaign. Yet, although these charges were given the widest publicity, and for months were in constant discussion during the campaign, the voters of Illinois elected Smith to the Senate, November 2, 1926, by a plurality of 67,330.

Senator McKinley's death, December 7, brought an unexpected

<sup>1</sup> The special committee created by S. Res. 195, agreed to May 19, 1926.

James A. Reed (Mo.) became its chairman. It was popularly known as the 'Slush Fund Committee.' For an appraisal of Reed's remarkable achievement in getting this resolution through a Republican Senate when it was clear that the investigation meant a ripping-open of Republican wounds and a devastating exposure of Republican methods, and for a characterization of the man, see 'Senator "Jim" Reed,' *Forum* (July, 1927), p. 62, by Frank R. Kent.

<sup>2</sup> For details as to Insull's contributions and Smith campaign expenditures, see S. Rept. 1197, of Dec. 16, 1926.



complication. Republican leaders in the Senate had been looking forward with anxiety to the necessity of facing the question as to the seating of Smith at the earliest March 4, 1927, when the Seventieth Congress should come into existence. But the notorious Governor Len Small — whose handling of public funds while State Treasurer had brought him within the shadow of prison walls — at once appointed Smith to fill the vacancy caused by McKinley's death. Though heavy and direct pressure was brought to bear upon Smith by Republican leaders in the Senate to persuade him to decline, he accepted the appointment. When, after weeks of delay, Smith appeared in the Senate Chamber, three resolutions were successively introduced: (1) Deneen, his colleague, presented the credentials of appointment. Since they were regular in form, and since there was no contestant, he offered a resolution that the oath be at once administered to Smith, and that any charges or objections raised as to his right to his seat be sent to the Committee on Privileges and Elections for prompt consideration and report.<sup>1</sup> (2) Overman offered a resolution declaring that Smith, duly appointed a Senator by the Governor of Illinois, was 'entitled to take the constitutional oath of office, and to be admitted as *prima facie* entitled to his seat without prejudice to any subsequent proceedings in the case.'<sup>2</sup> (3) Reed (Missouri) offered a resolution that Smith's *prima facie* right to be sworn in as a Senator as well as his final right to a seat as such Senator be referred to the Committee on Privileges and Elections, and that 'until such committee shall report upon and the Senate decide such question and right, the said Frank L. Smith shall not be sworn in or permitted to occupy a seat in the Senate.'<sup>3</sup> He contended that this case differed from all the others that had been cited in this cardinal respect, that, although Smith appeared with credentials in proper form, so that, if that were all the information the Senate had before it, the ordinary course would be to accept the *prima facie* showing, and allow the oath to be administered, 'in this case the Senate has official knowledge, gathered by its select committee, evidence taken under oath, printed and submitted to the Senate

<sup>1</sup> Deneen supported his proposal by a long speech citing twenty-three precedents. Jan. 19, 1927, *Cong. Rec.*, 1912-14. Deneen's resolution was along the line of action which had been taken, Dec. 6, 1926, in the case of Gould. (*Ibid.*, 9.) Note McKellar's speech, Jan. 4, 1927, opposing the seating of Smith. (*Ibid.*, 1039 ff.)

<sup>2</sup> *Ibid.*, 1921-22.

<sup>3</sup> *Ibid.*, 1914-15. Ashurst had introduced a resolution of similar tenor even before Smith's acceptance of the appointment had been announced. (S. Res. 297, Dec. 16, 1916.)



along with the findings, which overcome the prima facie showing of the certificate.'

At the end of two days of debate, by a vote of 48 to 33 the Reed resolution, refusing to administer the oath to the Senator-designate, was agreed to, and the question of his rights was referred to the Committee on Privileges and Elections.<sup>1</sup> 'This case,' said the *Boston Herald*, 'will make a precedent of enormous importance.' In this decision the Senate is believed by some to have 'set a precedent which, if not soon repudiated, may alter the entire theory of the United States Government.'<sup>2</sup> The debate had turned largely on the Senate's power to judge the 'qualifications of its members.' Bingham quoted Bayard of Delaware in a similar debate, January 10, 1862:

If he [the Senator-elect] was an idiot, you would not reject him. If he was a man destitute of all moral character, such that you would feel disgraced by associating with him, you could not by a majority vote of this body reject him when his state chose to send him here by the properly constituted authority.

Bingham declared that he, himself, stood upon that opinion 'absolutely.' Robinson dissented, insisting that the Constitution's clause as to 'qualifications . . . does not prevent the Senate from protecting itself against danger or from protecting itself against corruption; that provision is a limitation on the power of the Senate, and in no sense a definition of the power of the Senate.' Reed (Missouri) stated the real issue: 'The Senate must do justice not only to the state of Illinois but to the United States of America.'

The controversy over Smith and Vare loomed large on the eve of the opening of the Seventieth Congress, in regular session.<sup>3</sup> On its first day, December 5, 1927, when their names were called, Smith and Vare advanced to take the oath, but the ceremony was interrupted in both cases by Norris's offering resolutions reciting the charges relative to contributions and expenditures in their primary campaigns, as disclosed before the Reed committee, and declaring them 'not entitled to take the oath of office and not entitled to membership

<sup>1</sup> The vote was non-partisan. For the resolution were: Republicans, 15; Democrats, 32; Farmer-Labor, 1. Against, Republicans, 29; Democrats, 4.

<sup>2</sup> *Time*, Feb. 7, 1927. Southern Democrats showed some anxiety as to this 'invasion of states' rights.'

<sup>3</sup> As Senators-elect they had been occupying offices in the Senate Office Building, and enjoying the statutory perquisites of senatorial rank, including stationery and clerk hire. Both attended and voted in the Republican conference in the Senate Chamber. Their name plates were upon seats assigned them — significantly 'right at the Senate door.'

in the Senate of the United States.' <sup>1</sup> The resolutions stigmatized huge campaign expenditures in language identical with that which had been apologetically used in the resolution adopted by the Senate majority in confirming Newberry's right to a seat in 1922.<sup>2</sup>

On the following day debate began. It traversed familiar ground. Reed (Missouri) and Norris defended the right of the Senate to reject a Senator-elect in case of his lack of other qualifications than those specified in the Constitution.<sup>3</sup> Deneen defended Smith's claim, and transmitted to the Senate the joint resolution of the Illinois legislature, urging that 'the sovereign State of Illinois shall not be deprived of the rights of full representation in the Senate of the United States, as guaranteed by the Constitution.'<sup>4</sup> Borah urged that a Senator-elect, with credentials valid on their face, is entitled to take the oath, and that the state so sending him is entitled to be heard on the floor of the Senate through the person whom the state has chosen to represent it, and to be heard upon an equality with those challenging the judgment of the state. But if, after he has been thus sworn and heard, the Senate, acting upon committee report, decided that there was corrupt use of money 'in the election (including the primary), or if the facts disclose a condition which in the judgment of the Senate unfits him to be a Senator, he should be excluded, and may be excluded by a majority vote, under the Constitutional power of the Senate to judge of the election of its members.'<sup>5</sup>

At the end of the second day's debate, by a nearly two-thirds vote the Senate refused the oath to Smith, and referred his case for continued consideration to the Reed select committee, which had already conducted the investigation of his campaign expenditures.<sup>6</sup> But it was agreed that he be given a full hearing in his own behalf both in the committee and, after the committee's reports should be made, on the floor of the Senate before its final vote on his case.<sup>7</sup>

<sup>1</sup> *Cong. Rec.*, 3-4.

<sup>2</sup> Page 141.

<sup>3</sup> *Cong. Rec.*, 112-23.

<sup>4</sup> *Ibid.*, 123-27.

<sup>5</sup> *Ibid.*, 155-58. See his letter in *New York World*, Dec. 4, 1927.

<sup>6</sup> *Ibid.*, 161-62. By vote of 53 to 28.

<sup>7</sup> Smith appeared before the committee, and read a long statement in which he made no reference to the fact that four fifths of his campaign fund had come from 'utilities magnates' directly interested in decisions made by the Commerce Commission of which he was still chairman, but held forth on the injustice to a sovereign state in the denial of a seat to the man whom its voters had elected. (*Cong. Rec.*, 1219-20.) The committee also heard his counsel, the attorney-general of Illinois, and a delegation on the 'constitutional rights of Illinois,' as provided for by joint resolution of its legislature. (See comment, on adoption of the joint resolution, *ibid.*, 126-27.) Compare with surprising action of Wisconsin legislature, commending the Senate for 'refusing to seat Frank L. Smith of Illinois' and expressing 'the hope that in any similar case like action will be taken.' (*Ibid.*, 2499.)

Six weeks later the committee's report was presented, embodying a resolution which denounced Smith's credentials as tainted 'with fraud and corruption,' and declared his seat vacant.<sup>1</sup> The report was hotly debated for three days. Smith did not claim his privilege of being heard in his own behalf. Reed (Pennsylvania) warned the South of the danger of the precedent which the exclusion of Smith would set, and George (Georgia) replied.<sup>2</sup> Most of the debate turned on the proposition, as stated by Deneen, that in declaring Smith's seat vacant, without first seating him and permitting him to be heard on an equality with his accusers, the Senate would be nullifying the Constitution. Shortly before the vote was taken, by unanimous consent Reed (Missouri) secured a modification of the resolution, cutting out of it the statement that Smith was not 'entitled to the oath of office' because of the nature of the contributions to his 1926 campaign fund; and the resolution declaring the seat vacant was then passed by a vote of 61 to 23—a majority much larger than would have been necessary for expulsion.<sup>3</sup>

What would be the sequel? It was rumored that the Governor of Illinois might refuse to recognize a vacancy, and that Smith, as a perennial 'Senator-elect,' might present himself to be sworn in at the convening of the Senate in a new Congress, in 1929 or 1931. But after some weeks of meditation Smith 'resigned,' issuing a long statement announcing his intention to enter a special primary to test the will of the people of Illinois against the Senate's action in barring him from his seat. Governor Small at once reappointed him 'to fill the unexpired term,'<sup>4</sup> and issued a proclamation for a special senatorial primary in April. In that primary by a majority of more than 125,000, Smith was defeated for the nomination by Glenn, a young lawyer, who had made his campaign chiefly on the charge that Smith's primary campaign fund of 1926 had come from questionable sources, and that the expenditure of such large amounts to secure a nomination was not justifiable. Illinois had 'purged herself of her shame!'<sup>5</sup> But in 1930 Smith sought 'vindication.'<sup>6</sup> In a primary contest in

<sup>1</sup> *Cong. Rec.*, 1581–82.

<sup>2</sup> *Ibid.*, 1589–93.

<sup>3</sup> Jan. 19, 1928, *ibid.*, 1718.

<sup>4</sup> Smith, like W. A. Clark under similar circumstances, did not seek admission to the Senate upon this appointment. His experience recalls Frye's comment upon Martin Maginnis of Montana as a man who had enjoyed the most certificates of election to the Senate and the fewest seats there of anybody he had ever known.

<sup>5</sup> Editorial, *Chicago Tribune*.

<sup>6</sup> The details and the significance of *The Case of Frank L. Smith* are well presented by Carroll L. Woody. See also: H. C. Remick, *The Powers of Congress in Respect to Membership and Elections*, II, 159–524. Nearly five hundred pages are here devoted



which twenty-five aspirants contended for nomination for Congressmen-at-Large, he won a nomination as a Republican. A Republican won one of the two seats. Smith trailed 100,000 votes behind him, and 15,000 behind the Democrat who won the other seat.

#### THE CASE OF WILLIAM S. VARE

It was on the day following the Pennsylvania senatorial primary of May 18, 1926, that the Senate agreed to the resolution creating the select committee which should, as a part of its duty, investigate what the press was already calling 'the most costly primary in the history of politics.'<sup>1</sup> The committee began its activities by conducting a series of hearings to which the three aspirants for the Republican senatorial nomination in Pennsylvania were 'invited' (since each was the holder of high office: Governor, United States Senator, and Member of Congress), while their campaign managers and other officers were served with subpoenas. The authority of a Senate committee to compel testimony in regard to a 'primary' campaign as contrasted with an 'election' was promptly challenged.<sup>2</sup> But the challengers declared that they would voluntarily give any information that they could. Two days' hearings made it certain that the expenditures in this Pennsylvania primary campaign had been from ten to fifteen times as great as those which had made notorious the Michigan campaign which resulted in the nomination of Newberry. Early in July the committee's accountants reported that in the Republican primary campaign the expenditures totaled \$2,793,582.<sup>3</sup>

to reprinting material from the *Congressional Digest*, the *United States Daily*, and the *Congressional Record*, relating to the Smith and Vare cases. The material is neither classified nor indexed, nor is either case followed to its conclusion. The argument against the Senate's power to exclude a Senator presenting credentials in due form is strongly developed by James M. Beck, in *The Vanishing Rights of the States*.

<sup>1</sup> By S. Res. 195. For its scope, and the circumstances of its passage, see p. 146, n. 1. May 19, 1926, *Cong. Rec.*, 9676-77.

<sup>2</sup> Note the view held by Chief Justice White in the Newberry case. One of the most significant features of the work of this select committee and of the Senate's action upon its reports in the Smith and Vare cases is the Senate's practical acceptance of that view that the primary is a part of the election.

<sup>3</sup> Technically, in this Pennsylvania campaign large sums of money went into common funds for use in promoting the interests of coalition tickets between senatorial and gubernatorial candidates. The Pepper-Fisher coalition elements were unusually incompatible. Senatorial candidacies were the more engrossing, and Chairman Reed argued that monies should be considered as charged in each case to the senatorial candidate in the combination. The accountants itemized the accounts as follows:

Pinchot: Personal, \$43,767. Total, \$188,489.

Vare: Personal, \$71,436. Total for Vare-Beidelman, \$800,114.

(Later some 'notes' were discovered, materially increasing the sum.)

Pepper: Personal, \$2500. Total for Pepper-Fisher, \$1,804,979.



Despite the fact that for nearly four months the voters of Pennsylvania had before them the authenticated evidence that this enormous sum had been expended in the scramble to secure the Republican nomination, the Philadelphia machine worked with such efficiency that on the face of the returns in the November election Vare, the Republican nominee (and boss of the Philadelphia machine), won the senatorship by a majority of some 175,000 votes. The Democratic candidate had carried rock-ribbed Republican Pennsylvania outside of Philadelphia by more than 59,000, but the Vare-controlled Philadelphia organization overcame this and returned Vare a heavy winner.<sup>1</sup> Charges of fraud were immediately carried before the grand jury.<sup>2</sup> In seven wards thirty-two men were brought to trial, of whom fourteen were sentenced to fine, imprisonment or both, on charges of fraud, false entries, and other crimes in connection with the primary election.<sup>3</sup>

In January there was filed in the Senate a petition on behalf of William B. Wilson, the Democratic candidate, contesting Vare's alleged election, and citing many specific illustrations of palpable and gross errors in the election returns, particularly from Philadelphia.<sup>4</sup> The Senate, therefore, agreed to another resolution, empowering its select committee to take possession of 'and preserve all ballot-boxes ... used in said Senatorial election.'<sup>5</sup> The committee encountered serious difficulties in securing and investigating these ballot-boxes,

<sup>1</sup> In this primary campaign issues had been thoroughly muddled. In the minds of millions of voters the main question was the effect which the choice would have upon prohibition-law modification or enforcement. Pinchot was characterized as 'bone-dry'; Pepper, as 'moist,' but insistent upon reasonable enforcement; Vare, as 'wringing wet' — a man who 'makes a complete platform out of a beer-mug.' Behind the scenes the contest developed into a determined fight between the Mellon forces, backing Pepper, and the Vare forces, to gain control in Pennsylvania politics, in doubt since the death of Penrose. When Vare won the primary, the Mellon forces, swallowing their earlier declarations of Vare's gross unfitness for the senatorship, turned to his support, Senator D. A. Reed becoming in the Senate the indefatigable champion of Vare's claim to the seat. Governor Pinchot, on the other hand, gave to the press a statement, Sept. 13: 'I am a Republican, but I cannot stand for Vare. He is not fit to represent Pennsylvania in the Senate of the United States.' And he proceeded to quote the terms in which, during the campaign for the nomination, Vare's candidacy had been arraigned by Pepper, Reed, and Fisher.

<sup>2</sup> How was Vare 'put over'? See 'The Philadelphia System,' by Thomas Raeburn White, *Forum*, May, 1927; W. B. Wilson's letter, contesting Vare's right to the seat; and the reports of the Senate select committee, noted below.

<sup>3</sup> Data supplied to the writer by Mr. T. H. Walker, secretary of the Committee of Seventy. The persons convicted included three Republican committeemen, four registrars, three judges of elections, four inspectors, and one clerk.

<sup>4</sup> Jan. 8, 1927, *Cong. Rec.*, 1259-61; in modified form, March 4, *ibid.*, 5895-96.

<sup>5</sup> Jan. 11, S. Res. 324.

for, although Reed (Pennsylvania) had declared that he (and Vare) would welcome their production, in the last days of the Sixty-Ninth Congress by a one-man filibuster he prevented action upon a resolution specifically empowering the select committee to continue its activities beyond the term of that Congress. Accordingly, the committee found itself much hampered by the refusal of the Chairman of the Committee to Audit and Control the Contingent Expenses of the Senate to approve money for a committee whose continued existence he believed had not been authorized, and by the Sergeant-at-Arms' demurring at incurring expense on the orders of such a committee.<sup>1</sup>

On the morning of March 4, 1927, there was reported from the Committee on Privileges and Elections a certificate from Governor Fisher of Pennsylvania, that, November 2, 1926, 'Hon. William S. Vare was duly chosen by the qualified electors of the State of Pennsylvania a Senator from said State.' No action was to be taken on this document, which had been presented merely for filing. But it gave opportunity to a teasing Democrat to read and to have inserted in the *Congressional Record* the certificate which Governor Pinchot had sent to Vare, a copy of which the Governor enclosed in a letter addressed to the President of the Senate, in which he explained that he had deviated from the conventional form of credential, 'so wording the certificate required by law that I can sign it without distorting the truth.' Instead of asserting that Vare was 'duly chosen by the qualified electors' — as Governor Fisher later brought himself to do — Governor Pinchot certified that 'on the face of the returns . . . William S. Vare seems to have been chosen.' He further explained why he could not use the conventional form:

I cannot so certify, because I do not believe that Mr. Vare has been duly chosen. On the contrary, I am convinced and have repeatedly declared that his nomination was partly bought and partly stolen, and that frauds committed in his interest have tainted both the primary and the general election.

When Congress assembled in December, and new Senators were being sworn, the ceremony in the case of both Vare and Smith was halted by Norris's challenging resolutions, setting forth the charges against them, and, at the request of the majority leader, they stepped

<sup>1</sup> The resolution upon which Reed (Penn.) prevented action was S. Res. 364. For discussion of this committee's 'continuity,' and of its action in regard to Pennsylvania ballots, see pp. 537 ff.

aside.<sup>1</sup> After two days of hot debate, a resolution was passed, denying for the present Vare's right to take the oath, and referring his case for further consideration to the Reed (Missouri) select committee. As in the case of Smith, Vare was given the privilege to come before the committee, and also to speak on the Senate floor on his own behalf before the taking of the vote on his exclusion. Much time was taken by the committee's examination of ballot-boxes, poll-lists, registration sheets, and other election paraphernalia seized in Philadelphia County a year before, to test the charges of fraud set forth in Wilson's petition contesting Vare's election.<sup>2</sup> Meantime, a subcommittee of the Committee on Privileges and Elections was carrying on a recount of the ballots seized in Allegheny County, used in the election, November 2, 1926.<sup>3</sup> The investigation dragged on at great length and disclosed much damaging evidence.<sup>4</sup> In midsummer, 1928, Vare suffered a paralytic stroke. Although his health improved, and although great consideration was shown him in repeated postponements of the committee's final hearings, his physicians were never ready to permit him to appear before the committee. After its records had been offered to his attorney for rebuttal, with the result that Vare 'utterly failed to meet the evidence adduced against him,' the committee's report was presented.<sup>5</sup> It summarized the committee's findings, setting forth that more than \$785,000 had been expended in the primary in Vare's interest; and that numerous and various instances of fraud and corruption had been discovered both in the primary and in the election; and that these charges had not been controverted, though full and complete opportunity had been afforded. The report recommended that Vare 'be, and he is hereby denied a seat in the United States Senate.' But the veteran chairman of the committee, whose service in the Senate was to end within a week, declared: 'I never was able to hit a boy when he was down, and I just can't do it now!' If a resolution were brought in to render

<sup>1</sup> The debate turned largely on the right of the state to be represented by the man of its voters' own choice. Vare's attorney, James M. Beck, had recently issued a timely book, *The Vanishing Rights of the States*, stressing the Wilkes precedent in English parliamentary history. Note the statement filed by J. A. Reed, Dec. 6, 1927, and Norris's speech, *Cong. Rec.*, pp. 112-23, calling attention to the peculiar circumstances relating to Beck's 'residence,' when elected to the House.

<sup>2</sup> His amended petition was filed Jan. 16, 1928.

<sup>3</sup> Each committee had a representative watching the other committee's work.

<sup>4</sup> The most obvious fraud was in the 'zero divisions.' Early in the recount it was found that in 28 election divisions not a vote had been recorded for the Democratic candidate, and in as many more, only one ballot had been counted for him.

<sup>5</sup> S. Rept. 1858, presented Feb. 22, 1929.



final judgment in this case, he should vote for it, because it was his duty; but if it were not brought in, he should not insist upon it, but would let another Senate at another time finally dispose of the case. Another Senator brought in a resolution that Vare be denied a seat, but it was not acted upon. But the Senate, in accordance with the committee's recommendation, agreed to a resolution continuing this special committee in office, with all its empowering resolutions in full force, during the interval between the Seventieth and Seventy-First Congresses, and 'thereafter during the life of said Congress, unless sooner discharged by the Senate.'<sup>1</sup>

During the special session of the Seventy-First Congress, Norris introduced a resolution declaring Vare not entitled to his seat, but consented to allow it to go over to the regular session upon a unanimous-consent agreement that it should then be brought up for prompt consideration. On the second day of the regular session, when this resolution was brought up, there was considerable jockeying to postpone the possibility of a vote until after the presentation of the report upon the contest of Wilson, Democrat, for the seat. December 4, Vare addressed the Senate in his own behalf. The following day the Committee on Privileges and Elections filed a unanimous report declaring that Wilson was not elected, and an agreement was then reached that on the morrow at a specified hour the vote should be taken upon the Norris resolution and then upon the Reed resolution. Accordingly, December 6, three years and eight months after the denounced expenditures in the primary campaign had been made, the Senate by a vote of 58 to 22 declared that Vare was not entitled to the seat, and then immediately by a vote of 66 to 15 declared that Wilson 'was not elected and is not entitled to the seat.' After the vote was taken, both Vare and his champion, Reed, issued statements protesting against the decision as an injustice to Vare and to the state.<sup>2</sup>

<sup>1</sup> S. Res. 341. Feb. 26, 1929, *Cong. Rec.*, 4331-32. A special reason for continuing the life of this committee was that it might make a proper report upon the case of T. W. Cunningham, held for contempt of the Senate in his having refused to answer this committee's questions as to the sources of the contributions he had made to the Vare fund. (*Infra*, 528-29.)

<sup>2</sup> Reed (Penn.) added: 'The Senate's action seems to me to be in flagrant disregard of the Constitution and of the rights of the states. I believe that in years to come it will be regretted in the same way that today we regret the high-handed action of the Senate and House in reconstruction days after the civil war.'

Despite his physical disabilities, Vare announced his intention at the first opportunity to seek vindication at the polls. His ousting was immediately followed by Governor Fisher's nomination of J. R. Grundy to fill the vacancy. His credentials were presented December 12, but his seating was at once antagonized in resolution



## SENATORIAL RECOUNTS AND STATE LAWS

What is the latitude of the Senate in deciding whether a Senator has been 'duly elected'? Is it bound to follow the letter of a state's election laws? In 1925 Brookhart presented credentials certifying that November 2, 1924, he had been duly elected by the voters of Iowa. The contest on the petition of the Democratic claimant, Steck, was referred to the Committee on Privileges and Elections. Its subcommittee, which investigated the circumstances of the election and supervised a recount of the Iowa ballots under conditions which had been agreed upon by the two candidates, reported unanimously that Steck was elected, and by a vote of ten to one the committee reported that finding to the Senate, with the recommendation that Steck be seated.

In the campaign, Republican conservatives, eager to defeat the insurgent Brookhart for re-election, had backed Steck, and throughout the state Republican newspapers had printed sample ballots carrying arrows pointing to the square opposite his name, where the voter's cross should be made. On election day, to make assurance doubly sure, more than a thousand voters not only made the cross but drew an arrow pointing to it. The Supreme Court of Iowa ruled that any mark on a ballot placed outside of the prescribed square or circle, except by apparent accident, invalidated the ballot. In the state count, accordingly, all those 'arrowed' ballots were thrown out. In the Senate, debate turned mainly on the question: Shall the decision as to the validity of ballots in a senatorial election be determined by

and speech by Nye, supported by several others. The grounds of complaint were that he had raised some \$400,000 of cash for the \$1,000,000 campaign fund used in the 1926 primary to help nominate the Fisher-Pepper combination, and that therefore his hands were as soiled as those of Vare by excessive expenditures, and that for years he had been recognized as the tariff arch-lobbyist at Washington, and during the months while the Hawley-Smoot bill was taking shape had been incessantly active. A special report from the committee investigating lobbying was devoted to setting forth his lobbying practice and his language in the hearings before the committee in which he had characterized quite a number of Senators' constituencies as 'backward states,' and declared that they were supported and provided with good roads and other federal aid by such states as Pennsylvania, and 'they ought to talk darned small' when Pennsylvania's interests were concerned. Despite such denunciatory oratory, the majority of the Senate were unconvinced that they had a constitutional right to question the selection made by a governor. A resolution was adopted that he be sworn, and that thereafter his credentials and all matters relating to his title be referred to the Committee on Privileges and Elections, which some weeks later by unanimous vote instructed its chairman to report that Grundy was entitled to his seat. (S. Rept. 147, Jan. 31, 1930.)

In the senatorial primary campaigns of 1928 Illinois and Pennsylvania maintained their bad pre-eminence. For comment on the amounts and methods of expenditure, and on the Senate's investigation procedure, see pp. 537-40.

the letter of the state's election law or by the obvious intent of the voters? Strict constructionists insisted that it was no proper function of the Senate to 'make election law for the state.' Steck's supporters contended that the arrows on the ballots had only made more absolutely clear the voters' intention, to disregard which because of a legal technicality would be an injustice to the state.<sup>1</sup> By a close vote, crossing party lines, Steck was seated — the Senate thus giving more weight to the intent of the voters than to the letter of the state's law.<sup>2</sup>

#### THE RIGHTS OF CONTESTANTS FOR A SENATE SEAT

---

The Senate has shown great consideration for contestants who have advanced claims for a seat in good faith and on seemingly reasonable grounds, and for a member who has to defend his title.

#### THE RIGHT TO A HEARING BEFORE COMMITTEE AND SENATE

Not only has it been held — in the days before the Seventeenth Amendment — that a member of a state legislature might vote for himself as a candidate for the Senate, but in one instance, for the time being, a claimant's vote in the Senate was decisive in affirming his own title to a seat.<sup>3</sup> In repeated instances contestants have been allowed to come upon the floor of the Senate and present their own claims. In other cases this privilege has been denied.<sup>4</sup> Sitting Senators whose titles have been challenged, or whose expulsion has been brought under formal consideration, have not only given testimony before committees but have addressed the Senate in their own defense. In 1808 John Smith was allowed to appear before the Senate by counsel, and for twelve days his lawyers were in attendance to present the case against his being expelled.<sup>5</sup> While a resolution de-

<sup>1</sup> Members of the Committee on Privileges and Elections declared that, regardless of the 'intention of voters' rule, the recount showed a slight but clear plurality for Steck.

<sup>2</sup> April 12, 1926. For Steck, 45 — 29 Democrats, 16 Republicans; for Brookhart, 41 — 31 Republicans, 9 Democrats, 1 Farmer-Labor.

<sup>3</sup> See Stockton case, p. 82.

<sup>4</sup> Fishback, Baxter and Snow, Taft, *op. cit.*

<sup>5</sup> For the long and able speeches of Key and Harper, see *Annals of Congress*, 186–234, April 5 and 6, 1808.

claring his election invalid was under debate, May 11, 1900, William A. Clark addressed the Senate at length, and announced his resignation. On three successive days, July 11 to 13, Lorimer read prepared statements before the Senate, which on the last of those days declared his election invalid. Smoot made an impressive statement, February 19, 1907, the day before the final vote in the four-year controversy over his title.

#### COMPENSATION AND REIMBURSEMENTS

The Senate has dealt generously with claimants and defendants. Of course, successful contestants, when their claims have been established, have been paid the *per-diem* or salary and the mileage to which they would have been entitled had their actual service begun with the term for which they were elected. But unsuccessful contestants have also been 'moderately compensated' for their expenses in prosecuting their claims. Reconstruction years presented many anomalous cases. In several instances two claimants came from a state, each bearing credentials of election by one of the two bodies claiming to be its lawful legislature. Segar and Underwood presented themselves as Senators-elect from Virginia, with credentials showing that they had been elected by the 'Alexandria legislature,' February 17, 1865, a great part of the State of Virginia being in rebellion at the time. Neither of them ever served; but thirteen years after that election the Chairman of the Committee on Privileges and Elections reported:

If the petitioner, Joseph Segar, had been admitted to the seat which he claimed, his salary and mileage would have amounted to more than \$21,000. He was not admitted, and, having never performed the duties of a Senator, under the most recent precedent he is not entitled to compensation and mileage as such. By the same precedent, if he prosecuted in good faith and on reasonable grounds a claim for such seat, he should be allowed a moderate compensation for expenses in such prosecution. . . . We think the sum of \$5000 a reasonable and moderate allowance to Mr. Segar for three years' prosecution of his claim.

The following day it was agreed that that sum should be paid to Mr. Segar out of the Senate's contingent fund 'in full compensation for his expenses in prosecuting his claim.' The same action was taken a few days later in the case of Underwood's heirs.<sup>1</sup>

<sup>1</sup> The Senate allowed a 'moderate compensation' to two claimants from Georgia, and to two, Ray and McMillen, from Louisiana, none of whom ever served.



In 1907 Hale explained that in all contested election cases the practice of the Finance Committee was to put on, as an amendment to the General Deficiency Bill, the amendment offered by the committee that had had charge of the case. In Smoot's case his expenses were far in excess of the sum, \$15,000, which had been recommended to reimburse him for the expenses incurred in defending his title — in fact his counsel fees alone had amounted to \$20,000, and the investigation had dragged on through two entire Congresses.

For many years the law as to the beginning of a Senator's compensation was as follows:

Senators elected, whose term of office begins on the fourth day of March, and whose credentials in due form of law shall have been presented in the Senate, but who have had no opportunity to be qualified, may receive their compensation monthly, from the beginning of their term, until there shall be a session of the Senate.<sup>1</sup>

Some unforeseen and costly, not to say absurd anomalies have been noted under the operation of this rule. On the morning of March 4, 1927, report was made from the Committee on Privileges and Elections declaring the credentials of Smith of Illinois and Vare of Pennsylvania were in due form. The Vice-President ruled that no action on this report was necessary. It stood, he said, 'as received.' But it was not a mere formality. Despite the fact that it was to the last degree improbable that either of those men would ever be seated on those credentials, the receipt of this committee report by the Senate automatically put both of them on the Senate pay-roll. For the next nine months, at least, they would be entitled to the salary of a Senator, to an office in the Senate Office Building, to the regular staff of clerks, to the franking privilege, and other minor perquisites of a Senator.

But duplicated payments of salary and mileage, reimbursements, clerk hire, and the like for claimants who never became Senators by no means exhaust the list of costs which Senate election contests impose upon the taxpayer. There are the expenses of the hearings. In the Clark case these continued for 43 days. Forty-four witnesses were heard, and their printed testimony occupied 2677 pages. In the Stephenson investigation 25 days were devoted to hearings held in Milwaukee; 124 witnesses testified, and 35 affidavits were taken.

<sup>1</sup> 22 Stat., 632. The salaries of Senators elected or appointed to fill vacancies in the Senate, and of Senators elected for a full term subsequent to the commencement of such term, shall commence on the date of their election or appointment. 28 Stat., 162.



The bulky volumes of testimony in the Lorimer hearings filled nearly 9000 pages. In the Smoot case the testimony was somewhat less voluminous, but more than \$25,000 had been expended in securing it. In the Mayfield case many hearings were held in Washington, and the witness fees and travel and board expenses of scores of witnesses summoned from Texas involved heavy costs. In Senate debate it was stated in 1926 that contested election cases in the Senate were causing an annual expenditure of from \$200,000 to \$300,000.<sup>1</sup>

The Senate has come to the relief of Senators who during their service have had to incur heavy expenses in meeting charges that were not proven against them. At the request of George E. Spencer of Alabama, December 5, 1875, charges of bribery which had been made against him were investigated by a Senate committee which reported that the charges rested only on hearsay evidence and were not proven. Nearly ten years after Spencer requested this investigation, the sum of \$7132 was allowed him in reimbursement for expenses necessarily incurred by him in defense.<sup>2</sup> In 1921, on recommendation from the Committee on Privileges and Elections, the Senate authorized payment from its contingent fund of the sum of \$5000 to La Follette 'in reimbursement of fees and disbursements of counsel incurred by him in defense of his title to his seat,' because of 'treasonable utterance' alleged against him in the petition of the Minnesota Commission of Public Safety that he be expelled.<sup>3</sup>

#### THE FEDERAL CORRUPT PRACTICES ACT, 1925

---

The crudely drawn Federal Corrupt Practices Act of 1925 requires, at stated intervals before and after the election, correct and itemized accounts of the amounts distributed and expended by every candidate for the Senate or by any person for him with his consent in aid

<sup>1</sup> Feb. 17, 1926, *Cong. Rec.*, 4142. By the resolution authorizing a subcommittee to hear and determine the contest of Heflin against Bankhead, the cost was to be limited to \$25,000, but by successive appropriations through some fifteen months the costs mounted to \$95,000. (May 14, 1932.)

<sup>2</sup> Approved March 3, 1885, *Cong. Rec.*, 2441. Cockrell alone dissented. 'The principle involved in the resolution is vicious. There is no justice or equity in it.'

<sup>3</sup> Pages 197-98.

or support of his candidacy for election, and a statement of any pre-election promises or pledges made by or for him in relation to any person's appointment or recommendation for appointment, for the purpose of procuring support in his candidacy.<sup>1</sup>

It provides that, unless the laws of his state prescribe a less amount as a maximum limit of campaign expenditures,<sup>2</sup> in his campaign for election to the Senate a candidate may make expenditures up to (1) the sum of \$10,000, or (2) an amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for Senator, but in no event exceeding \$25,000. In determining whether his expenditures have exceeded the above limits, money expended for his personal, traveling, or subsistence expenses or for stationery, postage, writing or printing (other than for use in newspapers or on billboards), for distributing letters, circulars or posters, or for telegraph or telephone service, shall not be included.

The law does not make clear that any limit is placed upon the would-be Senator's expenditures in his campaign for nomination. Nor does it limit the amount that any committee may expend. Yet the sponsor of this law, Senator David I. Walsh, declared: 'That is the curse of all this situation, that a committee can expend a million dollars to elect a Senator, but the Senator himself is limited as to the amount he may expend.'<sup>3</sup>

<sup>1</sup> Passed as a rider upon the Postal Rate and Salaries Bill (sec. 301-19), approved Feb. 28, 1925. (U.S. Stat. L., XLIII, part 1, 1070-74.) Compare with two or more recent attempts to control campaign expenditures: La Follette's resolution of June 25, 1926 (S. Res. 261), to amend the Senate Rules by the addition of 'Rule XLI' — Admission of Senators, prescribing a limitation on campaign expenditure as a specific 'qualification.' This was favorably reported from the Committee on the Judiciary, with amendments, *Cong. Rec.*, 12661.

S. Bill 4179, McKellar, was intended to bring clearly within the corrupt practices law expenses by candidates in their campaigns for nomination in the primaries. It was passed by the Senate, May 29, 1928, but not acted on in the House. *Ibid.*, 10587-88.

<sup>2</sup> As an example of state regulation of such expenditures, Massachusetts (ch. 110, Acts of 1923) prescribes that 'no person, in order to promote his own nomination or election to the Senate shall himself, or through another person, give, pay, expend, or contribute any money or other thing of value' or promise to do so, in excess of \$5000 for his primary campaign and \$10,000 for his election campaign — the same limits which apply to candidates for the office of governor.

<sup>3</sup> Press report, Jan. 29, 1925.

## CONTESTS OVER APPOINTMENTS TO FILL VACANCIES

Nearly a fifth of the contests over the title to seats in the Senate have turned upon the power of state executives to fill vacancies. In the Federal Convention Wilson alone had protested against the grant of this power to the governors. Randolph had rejoined that it was necessary 'in order to prevent inconvenient chasms in the Senate,' and he thought the executives might be safely trusted with the appointment for so short a time.<sup>1</sup> Wishing to make it clear that a Senator might resign, Madison suggested that the clause, 'Vacancies may be supplied by the executive,' be made more explicit, and his proposed phrasing, 'Vacancies happening by refusals to accept, resignations, or otherwise,' formed the basis of the clause in the final draft of the Constitution which granted to the executive of a state power to make temporary appointments, 'if vacancies happen by resignation, or otherwise, during the recess of the legislature.'<sup>2</sup>

In a score of cases before the ratification of the Seventeenth Amendment the real question at issue was: 'Did the vacancy "*happen*" during the recess of the legislature?'<sup>3</sup> The most keenly contested case, in which the precedents of a century were thoroughly canvassed, arose over the acceptance of the credentials of Matthew S. Quay. The legislature of Pennsylvania convened January 3, 1899, and two weeks later began balloting to fill the vacancy about to be caused by the expiration of Senator Quay's term on the fourth day

<sup>1</sup> Aug. 9, 1787. On the motion to strike out the clause giving this power to the governors, eight states voted No; only Pennsylvania voted Aye; and Maryland was divided.

<sup>2</sup> Gouverneur Morris supported Madison's suggestion for the strange reason that unless a Senator could resign, a legislature, by electing a man to the Senate against his consent, might deprive the country of his services in some other capacity.

<sup>3</sup> Between 1789 and March 4, 1913, governors made 189 appointments to the Senate. Only 20 of these were contested. Ten of the 20 were recognized as having the right to serve on such appointments. Eight claimants were rejected by the Senate. In the other cases, either no report was made, or the Senate did not act on its committee's recommendation. (*Senate Election Cases*, 146-56.) Between March 4, 1913, and Jan. 3, 1935, governors appointed 59 Senators to fill vacancies. About one in four of these appointees were later elected to the Senate.



of March. As required by law,<sup>1</sup> it continued to ballot — seventy-nine times, in all — until April 20, when it adjourned *sine die*. The next day, the Governor appointed Quay to fill the vacancy which had been caused. It was upon the credentials certifying to this appointment that the Senate had to pass. Did a vacancy 'happen,' when on every legislative day for more than three months the legislature had been called upon to ballot to fill that prospective or actual vacancy?

The Committee on Privileges and Elections reported a resolution declaring that Quay was not entitled to a seat in the Senate. This was signed by the four Democrats on the committee, and one Republican (Burrows) concurred in the recommendation. The other four members — all Republicans — presented a resolution declaring Quay's appointment valid. For twenty days the matter was under debate. Then, in what was said to have been the most dramatic roll-call since the days of the Electoral Commission, by a vote of 33 to 32, Quay's right to the seat was denied.<sup>2</sup>

The minority, for whom Senator Hoar was the principal spokesman, insisted that 'happen' meant simply 'happen to exist,' rather than 'take place unexpectedly,' and they laid the utmost stress upon the importance, not only to the individual state but to the Union, that the Senate be kept full. Senator Hoar quoted Oliver Ellsworth — 'than whom,' he declared, 'there was no greater constitutional lawyer and statesman on the face of the earth anywhere' — as having said in the Convention debate upon this very provision for filling vacancies: 'As there will be but two members from a state, vacancies may be of great moment.' But the committee's report cited the long line of precedents in which it had been held that a Senator, appointed to fill a vacancy after a session of the legislature which had failed to fill the vacancy, was not entitled to his seat, and insisted that the question had long been settled and should remain settled.<sup>3</sup>

<sup>1</sup> Act of Congress of July 25, 1866; Pennsylvania statute of Jan. 11, 1867.

<sup>2</sup> *Senate Election Cases*, 107-42. Vote, April 24, 1900, *Cong. Rec.*, 4612. Those who voted or were paired against Quay were 17 Republicans, 19 Democrats, 6 Independents; for Quay, 32 Republicans, 6 Democrats, 3 Independents. Said Burrows in summing up the case: 'It is a heavy draft, even on the demands of friendship, for the claimant in this case to insist that the Senate shall reverse the adjudications of a hundred years, which he, himself, and his colleagues have so recently approved, that he may gain at best but a temporary seat in this body.' William D. Orcutt, *Burrows of Michigan and the Republican Party*, II, 125.

<sup>3</sup> Kensey Johns, 1794; James Lanman, 1825; Samuel S. Phelps, 1853; Lee Mantle, 1893; A. C. Beckwith, 1893; John B. Allen, 1893; Henry W. Corbett, 1897. For summaries, see *Senate Election Cases*.



As to the intent of the framers of the Constitution, Burrows cited the case of Kensey Johns, the essential facts of whose appointment were closely parallel to those of Quay's. Senator George Read of Delaware resigned his seat in December, 1793, during a recess of the legislature, which convened the following month. Throughout its entire session the Senate vacancy was in contemplation, yet it adjourned in February, *sine die*, without having elected a Senator. Some weeks later the Governor appointed Kensey Johns to fill the vacancy. His credentials were referred to a committee, which reported that he was 'not entitled to a seat in the Senate of the United States, a session of the legislature of said state having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.' The Senate agreed to this report by a vote of 20 to 7. The importance of this particular precedent lies in the facts that this decision was rendered less than five years from the adjournment of the Federal Convention; that the Senate then included in its membership five of the framers of the Constitution, four of whom voted against Johns's claim; and that Oliver Ellsworth, who had taken part in the Convention's debate on this very clause as to the filling of Senate vacancies and whom Senator Hoar had cited as the constitutional authority beyond whom there could be no appeal, was a member of the committee which brought in the unanimous adverse report, and in the Senate voted for its acceptance.<sup>1</sup>

For the filling of such vacancies, the Constitution authorized state executives to 'make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.' Did this mean that the appointed Senator's service must end as soon as the legislature of his state should next convene? In repeated cases it has been held that such an appointee was entitled to hold his seat during the next session of the legislature until that body should elect a successor and the Senate be officially informed of that fact;<sup>2</sup> but that a recess appointee was not entitled to hold his seat after the adjournment of the legislature without electing a Senator to fill the vacancy.<sup>3</sup>

<sup>1</sup> *Senate Election Cases*, 1-2.

<sup>2</sup> Samuel Smith, 1809 (*Senate Election Cases*, 4); Robert C. Winthrop, 1850 (*ibid.*, 10-12); Archibald Dixon, 1852 (*ibid.*, 13-15). See application of this ruling in case of Mrs. Felton (*infra*, 168). Senate documents are inconsistent on this point. In the list of Senators in the *Senate Manual*, the date of the expiration of the term of Rawson (Iowa) is given as Nov. 7, 1922, the date on which Brookhart was elected. But Rawson continued to attend and vote in the Senate for more than three weeks, up to the date when Brookhart was sworn in.

<sup>3</sup> Samuel S. Phelps, 1853, *Senate Election Cases*, 16-22.

The provisions of the Seventeenth Amendment speedily gave rise to two contests involving appointments made by governors to fill vacancies. The pertinent clauses of the Amendment are as follows:

2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The amendment's ratification was proclaimed by the Secretary of State under date of May 31, 1913. It was generally held — as implied by the closing words of section 2 — that the amendment was not self-executory. The Governor of the State of Washington by telegraph urged that Congress at once pass a law which would obviate the necessity of calling special sessions of legislatures to empower governors to fill vacancies, but, though Congress remained in session continuously, more than a year passed before it dealt with this problem.<sup>1</sup>

Meantime Maryland's Republican Governor, acting on the advice of a Democratic Attorney-General, issued writs for a general election to fill a vacancy caused by the death of Senator Rayner — a vacancy which had been filled November 29, 1912 (six months before the ratification of the Seventeenth Amendment), by the Governor's temporary appointment of William P. Jackson. In that election, which was conceded to have been a free, full, and fair expression of Maryland voters' will, Blair Lee, Democrat, received a majority over all opponents of more than 26,000. Against his claim to the seat, some of the ablest members of the Senate, both in committee and in the later debate, took the ground that the Governor had not been authorized by any law, federal or state, to issue a writ for that election, and that under section 3 of the Amendment the 'term' of the sitting member (Jackson) could not be 'affected.' On the other hand, the majority of the committee held that an appointed Senator's service was not for a definite 'term,' and they insisted that after formal amendment of the Constitution had decreed that Senators should be elected by the people, it was an absurdity to contend that that appointee, Jackson, 'should now hold office until a legislature,

<sup>1</sup> The first session of the 63d Congress, then in progress, lasted till Dec. 1 — the day on which the first regular session began, lasting till Oct. 24, 1914.

which has no power to elect, shall fail to elect, and adjourn without electing.' After long debate, January 28, 1914, by a vote of 53 to 13 Lee was declared entitled to the seat to which the people had elected him. Every Senator whose vote indicated constitutional doubts of the validity of Lee's election was a Republican.<sup>1</sup>

While this Maryland case was still pending, question was raised as to another governor's action. Senator Joseph F. Johnston of Alabama had died ten weeks after the ratification of the Seventeenth Amendment. In contrast with the Governor of Maryland, the Governor of Alabama took the view that until an act of Congress or a law of Alabama authorized the calling of a special general election to fill such a vacancy, it must be filled as theretofore; and he made an appointment. In the Committee on Privileges and Elections the members who had just favored the seating of Lee opposed the admission of the Alabama appointee, and *vice versa*. Though the issues were nearly identical, the new case called forth extended debate; but the committee's resolution declaring the appointee not entitled to a seat was agreed to by a vote of 34 to 30.<sup>2</sup>

A dozen years later this precedent figured largely in the debates over the seating of an appointee from North Dakota to a vacancy caused by the death of Senator Ladd, June 22, 1925. After six months of indecision, the Governor, November 14, 1925, appointed Gerald P. Nye 'to represent the said State in the Senate of the United States until the vacancy . . . is filled by election, duly called for June 30, 1926.' Upon this appointment the Committee on Privileges and Elections reported adversely, its spokesman setting forth in an elaborate speech the two propositions which the report upon the Glass case of 1914 was held to have indisputably established: that a United States Senator is not a 'state officer,' and that the Seventeenth Amendment 'contemplated, indubitably, future affirmative action by the state before the governor can exercise the power of appointment.' The supporters of Nye's title laid stress upon the right of each state to 'equal representation in the Senate'; they insisted that a Senator was a 'state officer,' and that this appointment was legally made under a North Dakota Act of 1917, providing that vacancies

<sup>1</sup> *Cong. Rec.*, I.I. 63d Cong., 2d sess. Reports and resolutions, 2014, 2091, 2252; debate, 2319-29, 2414-26.

<sup>2</sup> *Ibid.*, 2864-86. Twenty-six Republicans and 8 Democrats voted against seating the appointee; 4 Republicans and 26 Democrats voted in his favor. The vote was thus less partisan than in the Lee case, which seems to have been accepted by many as a binding precedent.



'in state and district offices' should be filled by the Governor -- an act, however, which was merely a development and extension of the Territorial Code of 1877, in which this identical phrase could not conceivably have been used with reference to a vacancy in the United States Senate. After five days of debate, January 12, 1926, by a vote of 41 to 39 the Senate affirmed Nye's title.<sup>1</sup>

In the years since the ratification of the Seventeenth Amendment the individual states, as permitted by that amendment, have been framing their own laws to determine under what conditions the governor may fill a vacancy by making a temporary appointment instead of issuing writs for a special election to choose the Senator. Their object, of course, is on the one hand to avoid the turmoil and expense of a special campaign for the nomination and election of a Senator when a general election is to be held in the near future, and on the other hand to avoid giving too much Senator-making power to the man who may be governor when the senatorial vacancy 'happens.' The discretion left to the governor may be of far-reaching effect. The mere leeway as to the dates between which it may be within his power to call for the special election may be turned to the advantage of one candidate rather than another. The chance which brings the occurrence of the vacancy near to or remote from a general election may make a vast difference in the resulting choice.<sup>2</sup>

<sup>1</sup> This decision is not likely to weigh heavily as a 'judicial' precedent. The appointee was an 'insurgent' Republican and a most pronounced opponent of the United States' adhesion to the World Court, an issue which was daily under debate while this contest was in progress, and which was soon to be brought to a vote. Borah and other opponents of the World Court, together with 'insurgent' Republicans, voted with most of the Democrats to seat Nye. Several Republicans from the Middle West, who were to be candidates for re-election in the following November, were significantly absent and unpaired. (Cummins, McKinley, and Norbeck.) On the other hand, four Democrats of eminence as authorities on constitutional law (Bayard, Bruce, George, and Walsh) presented cogent arguments against Nye's title, and several other Democratic leaders joined with most of the Republicans in voting against it. The most extended arguments were presented by Goff against the Nye title (*Cong. Rec.*, 1926, Jan., 1926) and by Stephens for it (*ibid.*, 1926, Jan., 1926).

<sup>2</sup> *Massachusetts* law (ch. 57, Acts of 1922) provided:

Upon failure to choose a Senator in Congress or upon a vacancy in said office, the vacancy shall be filled for the unexpired term at the following biennial state election, provided said vacancy occurs not less than sixty days prior to the date of the primaries for nominating candidates to be voted for at such election, otherwise at the biennial election next following.

Pending such election the governor shall make a temporary appointment to fill the vacancy, and the person so appointed shall serve until the election and qualification of the person duly elected to fill such vacancy.

Under this law, the vacancy caused by the death of Henry Cabot Lodge, Nov. 9, 1924 (five days after the regular biennial election), was filled Nov. 13, 1924, by the Governor's appointment of William M. Butler, to serve 'until the qualification of the person who shall be elected Nov. 2, 1926.' Democrats at once announced their intention to seek the repeal of the above Act of 1922, as 'unconstitutional,' insisting that an



Some 'politics' may occasionally be discovered or suspected in the timeliness with which vacancies in the Senate are likely to 'happen.' Thus, in midsummer, 1929, it was authoritatively stated that Senator Edge of New Jersey was to be appointed Ambassador to France, to succeed Ambassador Herrick, deceased. The Senate was then in session. Had the nomination been then submitted to the Senate and confirmed, the resulting vacancy would have happened so many weeks prior to November that it would have had to be filled at the regular election in that month, with the chance that it might result in the sending of a Democrat to the Senate. The nomination was not transmitted to the Senate till November 21, and on that day, by unanimous consent, it was confirmed, without being referred to a committee. On that same day the Republican Governor of New Jersey appointed David Baird to fill the vacancy caused by Edge's resignation, announcing further that Mr. Baird would retire in 1930, to be succeeded by Dwight W. Morrow, who would be appointed

appointment which covers all the sessions which may be called during the full two-year period of a Congress 'passes the bounds of the "temporary" provisions of the Constitution.'

This appointment not only gave to the appointee an opportunity during two years to strengthen his claims for election, but also to exercise great influence for his party within the Senate Chamber. Mr. Butler had been chairman of the National Republican Committee during the campaign which resulted in the election of President Coolidge. Nov. 18, 1924, it was announced that he would retain that position while in the Senate. (So Mark Hanna had done in 1898, and, while a Senator, he conducted McKinley's second campaign in 1900.) Dec. 4, 1924, Butler's name was placed on the list of the new Republican Senate Steering Committee, a most unusual assignment for a Senator in the first year of his service.

#### *Indiana.*

When, for any cause whatsoever, a vacancy occurs in the representation of the State of Indiana in the Senate of the United States, the same shall be filled forthwith by the governor who shall have power to appoint, to fill such vacancy, some suitable person possessing the qualification necessary for senator. The person so appointed shall hold office until the next regular election of state officers, when such vacancy shall be filled by the election of a Senator who shall hold office for the unexpired term. (Ch. IV, General Laws, 1915.)

Under this law, the vacancy caused by the death of Senator Ralston (Dem.), in October, 1925, was promptly filled by the Republican Governor's appointment of Arthur R. Robinson (Rep.), to hold office till the November election in 1926.

#### STOP-GAP APPOINTMENTS

A variety of motives may determine the promptness with which a governor names a Senator to fill a vacancy caused by death or resignation.

Governor T. W. Hardwick showed more gallantry than sense of responsibility when — in order to commend himself to Georgia's newly enfranchised women and to give an estimable eighty-seven-year-old woman the satisfaction of getting her name upon the roll of Senators — he appointed Mrs. Rebecca L. Felton to fill the vacancy caused by the death of Thomas E. Watson. In her credentials he stated that her 'commission' was to continue in force from Oct. 3, 1922, until her successor 'is elected and qualified.'

Nov. 7, 1922, the people of Georgia elected Walter F. George to fill that same vacancy. When the Governor heard that Mrs. Felton intended to go to Washington,

upon his return from the Naval Conference in London, to serve until after the November election, at which time the voters would choose a Senator to fill the unexpired Edge term, and also one for the full six-year term.

relying on Senator-elect George's credentials being withheld until she should have been sworn in, the Governor, who had appointed her, declared: 'According to the law of the nation and of the State of Georgia she hasn't the shadow of a title to a seat in the Senate.' (Press report, Nov. 14.) But on the opening day of the session, Senator Harris of Georgia informed the Senate that Senator-elect George 'very generously and very graciously has withheld his credentials in order that Mrs. Felton may take the oath,' and he repeatedly expressed the hope that no Senator would object to her so doing. (*Cong. Rec.*, Nov. 21, pp. 11-14.) On the other hand, press reports (*Boston Herald*, Nov. 18) declared that Vice-President Coolidge and Chairman Curtis of the Committee on Rules in conference had agreed that, irrespective of Mr. George's attitude, if any individual Senator offered objection, Mrs. Felton could not be sworn in, if the precedent were followed which had been set by Vice-President Marshall, who had declared that he thought his 'duty as plain as a pikestaff' to hold that the tenure of office of a Senator holding temporary appointment expired on the day of the election of his successor. (Letter of Oct. 15, 1918, to Chas. F. Pace, Financial Secretary of the Senate.) The Vice-President further declared: 'In the discharge of my sworn duty I can certify no compensation [to the appointee] beyond that date.'

Senator Thomas J. Walsh argued the case at length, citing various precedents — especially that of Robert C. Winthrop (*Senate Election Cases*, 10) — to sustain the right of a governor's appointee to sit and to participate in the deliberations of the Senate until such time as his successor's credentials should actually be presented in the Senate. No objection was made, and Mrs. Felton was sworn in, and took her seat as 'The First Woman Senator.' The next day, Nov. 22, 1922, she made a two-minute speech, expressing her gratitude to 'the chivalric Governor and the chivalric Senator-elect' who had given her this great happiness, and referred to her taking a seat in the Senate as 'a romantic but also a historical event,' which was being 'watched by 10,000,000 women voters.' Immediately thereafter, the presentation of Mr. George's credentials brought 'Senator Felton's' service to an abrupt end.

But there still remained the problem of paying for the venerable 'Senator's' junket. Senator Harris introduced a resolution that there be paid from the contingent fund of the Senate 'to Rebecca Latimer Felton \$287.67 for compensation and \$280 as mileage, the same being the amount due to her as a Senator from the State of Georgia from November 8 to November 21, 1922.' Senator Walsh, who had labored to justify Mrs. Felton's right to take the oath, expressed the hope that this resolution would not pass, insisting that as a member she should be paid from the regular salary fund, and adding: 'I trust that we shall not throw further confusion into the matter by now exhibiting some doubt as to whether Mrs. Felton was really a member of the Senate from Nov. 8 to Nov. 21.' Nevertheless, this resolution, reported back favorably without amendment from the auditing committee, was considered by unanimous consent and agreed to. In the roll of Senators printed in the official *Rules and Manual of the Senate* Mrs. Felton's service began Oct. 3, the date of her commission, and ended Nov. 7, the day on which Senator George was elected. To date the beginning of her compensation from the day *following* the election of 'her successor,' as was actually done, adds the final absurdity to this fiasco.

No woman has yet (1938) made her first entrance to the Senate by election. Mrs. Caraway and Mrs. Long came to the Senate on appointment, to serve till election or till the end of their husbands' unexpired terms. In Arkansas an election was held within three months. Backed in her campaign by Huey Long, Mrs. Caraway was elected for the unexpired term, and for the full term following. Mrs. Long, appointed Jan. 1, 1936, served on that appointment till Jan. 3, 1937.

Within forty-eight hours of the confirmation of Hugo L. Black as a Justice of the Supreme Court, to fill the vacancy caused by his resignation from the Senate, Governor Bibb Graves named his wife, and by airplane they together set forth for Washington. The next day, August 20, 1937, the Governor witnessed the presentation of the cre-

## CONTESTS OVER THE QUALIFICATIONS OF A SENATOR

The Constitution of the United States does not prescribe the qualifications of a Senator in the sense here assumed. Its language is that of exclusion and not of qualification: 'No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.'<sup>1</sup>

## AGE

Henry Clay first entered the Senate by the Kentucky legislature's election, to fill the vacancy caused by the resignation of Senator Buckner Thruston. There is no evidence that at the time of his election or at the time of his taking the oath, November 19, 1806, there was registered any protest on the ground that he was barred

credentials he had signed, and the administering of the oath to Senator Dixie Graves. She served but a few weeks, until the election of her successor.

(Mrs. McCormick is the only woman who has ever campaigned for nomination and election to the Senate 'in her own shoes.' She was the widow of former Senator Medill McCormick. But she had proved her own aptitude for a political career by winning election and serving in the House, as Congresswoman-at-large from Illinois. See p. 541.)

The Senate witnessed another expensive junket in 1932. Sept. 26, to fill a vacancy caused by the death of Waterman (Rep.) the Democratic Governor of Colorado appointed Walter Walker (Dem.) to serve until the seat should be filled by election. The election was held Nov. 8, and it was known that Schuyler (Rep.) had been elected with a margin of over 1000 votes. But not till Dec. 5 — the very day on which Congress was to convene — did the Colorado Canvassing Board, awaiting the tabulation of the 200 votes from one isolated county, declare Schuyler elected. That it should have proved impossible to secure these returns — which in any case could not affect the result — seems sufficiently preposterous. Urged on, so he said, by state and national Democratic leaders, Walker made a dash for Washington, nearly 400 miles by automobile over snow-covered roads and then some 2000 miles by airplane, reaching the Senate Chamber on the opening day of the session. His taking the oath made it mathematically possible for his party to 'take control of the Senate,' but Democratic Leader Robinson said 'it would be childish to do anything like that.' For the moment, the party line-up was: Democrats, 48; Republicans, 47; Farm-Labor, 1; 'Senator' Walker's actual service consisted in taking the oath, Dec. 5, and in answering to his name in a roll-call to determine the presence of a quorum once, Dec. 6, and again, Dec. 7 — at the end of which roll-call Schuyler's credentials, received by air-mail, were presented, he took the oath, and instantly 'Senator' Walker's service came to an end. But upon vouchers from the Committee on Privileges and Elections 'Senator' Walker received \$1775 as salary and \$664.80 for mileage, and his name is forever enrolled upon the list of Colorado's Senators.

<sup>1</sup> Speech by Senator George E. Pugh, March 3, 1856.

Charles W. Waterman  
died Aug. 27, 1932

Walker served from Sept. 26, 1932  
until Dec. 6, 1932



by the Constitution's declaration: 'No person shall be a Senator who shall not have attained to the age of thirty years.' In the words of Carl Schurz, his Senator-biographer, 'In all probability, Clay, himself, did not think of it.' Yet on the day when he took the oath he lacked nearly five months of that age requirement — and his first period of service expired March 4, nearly two months before his thirtieth birthday.

Armistead T. Mason took the oath of a Senator from Virginia, January 3, 1816, at the age of twenty-eight years and five months, apparently without protest; and like Clay he served to the end of his term, a period of fourteen months, without 'attaining to the age of thirty years.'

Nearly six score years later, for the first time came serious consideration of the precise import of the Constitution's age requirement. In 1934 a young West Virginian, Rush D. Holt, entered the lists for the Democratic nomination and became the opponent of the Republican, Senator Hatfield, who was seeking re-election. In his campaign on the stump and over the radio Holt capitalized his youth, stating frankly that he would not become thirty years of age until five months after the beginning of the term for which he was seeking election. By his own avowals no voter of his state was left in any doubt upon that point. Nevertheless, in the primary he received more than twice as many votes as were cast for any of his opponents, and in the election, despite intensified broadcasting of the argument that his election would be invalid, he led the Republican nominee by more than 68,000 votes.

Though Holt at first seemed confident that the Senate 'would follow the Clay precedent,' and seat him without demurring at the opening of the term for which he had been elected (January 3, 1935), his party leaders persuaded him not to present his certificate till he had actually reached the age of thirty. Accordingly, June 30, 1935, the day following his birthday, the senior Senator from West Virginia called up the contested election case of Hatfield *v.* Holt.<sup>1</sup> The Senate devoted the better part of two days to a searching consideration of the points at issue. More than half of the members of the Senate actually took part in this debate.<sup>2</sup> From the Committee on Privileges

<sup>1</sup> Hatfield in April had entered a contest, alleging that Holt's election was void because his age requirement was not completed at the time of the election, and advancing his own claim to the seat on the absurd ground that he had received 'the next highest number of legal votes cast in the November election.'

<sup>2</sup> Almost every conceivable interpretation was put forward as to the 'Framers' intent in the Constitution's seventeen-word age requirement. At what point must



and Elections, which had been conducting hearings, came a majority and a minority resolution. At the end of the debate, the vote came first upon the latter, which declared that Holt's election was void, 'he not having attained the age of thirty years at the commencement of the term for which he was elected.' This resolution was rejected by a vote of 62 to 17. By the same vote, the majority's resolution was then agreed to, as follows:

Resolved: That Rush D. Holt is entitled to his seat in the Senate of the United States as a Senator from West Virginia, it appearing that he was thirty years of age at the time when he presented himself to the Senate to take the oath and to assume the duties of the office.

The decision may prove an embarrassing precedent, but Holt's heavy lead in the election left no doubt that his seating accorded with the deliberate and pronounced choice of the West Virginia constituency.

#### CITIZENSHIP

Albert Gallatin was the first man whose election to the Senate was challenged on the ground of too short a previous period of citizenship. Born in Geneva, he had come to Boston in 1780. Three years later he had moved to Virginia, where he purchased lands, and in October, 1785, he took the oath of allegiance to Virginia. Later in the same year he bought a plantation in Pennsylvania, where he was residing when elected to the Senate, February 28, 1793. He was sworn in and took his seat, December 2, 1793, and held the office till February 28, 1794, when, after several days' debate in which Gallatin defended his own claims, it was resolved by a vote of 14 to 12 'that the election of Albert Gallatin to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States.'<sup>1</sup>

the person 'have attained to the age of thirty years'? At the date of his election? Or of the beginning of the term for which he was seeking election? Or at the date on which he presents himself to take the oath of a Senator? Taking part in the debate were two Senators who after their election to the Senate for more than a year had retained the office of governor, before coming to Washington to take the oath. With equal vehemence they argued, the one maintaining that Holt's election was void, the other that it was valid. If Holt had presented himself January 3, should his right to be sworn have been admitted? If he had then been denied the oath, could he later have been sworn in? If a man may become a Senator upon taking the oath six months after the beginning of the term upon passing his thirtieth birthday, might a man, 'elected' at twenty-five, claim his right to 'his seat' five years later? During that period of five years, would the seat be 'vacant'? If so, might the governor fill such a vacancy by a temporary appointment? Such are samples from the maze of perplexity in which Senate debate of two days wandered. (June 20-21, 1935.)

<sup>1</sup> *Senate Election Cases*, 157-67. For the first time in the history of the Senate the

In Gallatin's case partisan politics may have influenced the decision. Nearly fifty years later a determination as to the citizenship qualification had to be made in a case where no partisan bias could be suspected. Probably not a man in the Senate wished the exclusion of General James Shields, but he had completed his naturalization October 21, 1840, and on the first day of the term for which he claimed election as a Senator from Illinois, he lacked some seven months of the full nine years of citizenship prescribed by the Constitution. Calhoun was most insistent that the question here involved should be 'clearly settled, not only for the present, but for all future time,' and he phrased the amendment by which the resolution was made to declare Shields's election void, 'he not having been a citizen of the United States for the term of years required to be a citizen of the United States at the commencement of the term for which he was elected.' Webster strongly supported that contention. On the other hand, Douglas and Butler took the view that the term of completed-citizenship test applied neither at the time of election, nor at the beginning of the service term, but only when the man presented himself to take the oath and to begin the performance of his duties as Senator. The Senate approved the Calhoun amendment. General Shields had taken the oath of office, March 6, 1849, and his credentials had been referred to a special committee. But upon the passage of the above resolution his seat became vacant. Seven months later he was re-elected by the Illinois legislature for his original term, and was welcomed back to the Senate.<sup>1</sup>

In 1870 a man born in the United States and duly elected to the Senate by a state legislature found his claim to a seat challenged on the question of his citizenship. In the debate on the resolution to refer his credentials to the Committee on the Judiciary with instructions to determine whether Hiram R. Revels of Mississippi had been 'nine years a citizen of the United States,' supporters of the resolution,

secrecy of its sessions was relaxed. It was resolved, Feb. 11, 1794, 'that the doors of the Senate be open during the discussion of the contested election of Albert Gallatin.' *Ibid.*, 159.

<sup>1</sup> Hinds, *Precedents of the House of Representatives*, sec. 429, and authorities there cited. In the reports and debate on the Holt case (June, 1935) opponents to his seating insisted that no precedents were afforded by the seating of Clay and Mason, when heedlessly these two under-age men had been allowed to take their seats. But great stress was laid upon these two cases when two men, who had been allowed to take the oath, after careful debate were deliberately excluded, because the prescribed term of citizenship had not been completed. In the Shields case the utmost emphasis was placed upon 'the commencement of the term for which he was elected' as the precise date which should meet the requirement.

on the basis of the Dred Scott decision, urged that Revels, being partly of African blood, was not a citizen at birth, but had become a citizen only on the ratification of the Fourteenth Amendment. In reply it was insisted that the question of the citizenship of American-born persons of African descent, as shown by the diverse court decisions, had long been one on which the public mind was not settled, but that, despite the Dred Scott decision, it had now been placed beyond controversy by the enactment of the Civil Rights Bill and the ratification of the Fourteenth Amendment, both of which were not enactments for the future, but were declaratory of an existing status, that 'all persons born . . . in the United States and subject to the jurisdiction thereof *are* citizens of the United States.' The resolution to refer Revels's credentials was defeated by a vote of 6 to 1, and the oath was at once administered to the first Negro Senator.<sup>1</sup>

#### RESIDENCE

In two instances question has been raised whether a Senator-elect was 'an inhabitant of that state' for which he was chosen. It was promptly decided that, inasmuch as the Ohio constitution defined neither inhabitancy nor citizenship of that state, its governor's certificate that the claimant, Stanley Griswold, was a citizen of Ohio, was sufficient.<sup>2</sup> Of greater interest was the case of Adelbert Ames. Born in Maine, from his entrance to the United States Military Academy he had been continuously in military service. In 1868 he was ordered to Mississippi, and at the time of his election he was holding the offices of provisional governor and district commander. To the Senate committee Ames explained that he had publicly announced his resignation from the Army and his intention to remain and reside in Mississippi, and that his resignation had been accepted by the President before signing the bill to admit the state. The committee reported that Ames, when elected, was not an inhabitant of the state for which he was chosen in the meaning of the Constitution. But his services, past and prospective, to the Republican Party were not to go unrecognized. Charles Sumner's motion to strike out 'not'

<sup>1</sup> Revels had been elected to fill a vacancy, and served little over one year. Apparently this question of citizenship was not raised in the case of Blanche K. Bruce, also from Mississippi, who served a full term in the Senate, 1875-81. These were the only Negroes elected to the Senate, where both of them made highly creditable records. G. F. Hoar, *Autobiography*, II, 59. *Senate Election Cases*, 370. Feb. 25, 1870, *Cong. Globe*, 1503; 1542; 1557; Appendix, 125-30.

<sup>2</sup> *Senate Election Cases*, 174.



from the committee's resolution was carried by a vote of 40 to 12, and Ames at once took the oath.<sup>1</sup>

#### MAY A STATE IMPOSE ADDITIONAL QUALIFICATIONS?

That a state may not superadd qualifications to those required for Senators by the Constitution was the Senate's decision in two cases which turned upon the provisions of a state constitution imposing upon judges within that state ineligibility to other offices.<sup>2</sup>

#### MAY THE SENATE IMPOSE ADDITIONAL QUALIFICATIONS?

May the Senate, itself, as judge of the qualifications of its own members, insist upon positive qualifications in addition to the negative grounds for exclusion established by the Constitution?<sup>3</sup> One phase of this question was involved in the instructions, given April 30, 1844, by the Senate to a select committee to inquire into the election, return, and qualification of John M. Niles, 'and to his capacity at this time to take the oath.' The situation was doubly embarrassing, for Niles had previously been a member of the Senate; moreover, some members doubted whether the Constitution authorized the Senate to make such an inquiry. Fortunately the committee was able to report that though the Senator-elect 'is at this time laboring under mental and physical debility, he is not of "unsound mind," in the technical sense of that phrase. Encouraging medical testimony was adduced, and in accordance with the committee's recommendation, Niles was permitted to take his seat.'<sup>4</sup>

<sup>1</sup> *Senate Election Cases*, 375-77.

<sup>2</sup> Charles J. Faulkner, W.Va., 1877, *Senate Election Cases*, 722, 726; Lyman Trumbull, Ill., 1855, *ibid.*, 228-34. For discussion of 'geographical' conditions imposed upon the choice of Senators in Vermont and Maryland, see G. H. Haynes, *Election of Senators*, 31.

<sup>3</sup> The argument in the negative is clearly presented by Charles Warren: 'The Convention defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven to four; and it also rejected the proposal for a property qualification, by a vote of seven to three. . . . Certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress.' *The Making of the Constitution* (1929), 412-26. But see Price Wickersham's line of argument, *infra*, 179, n. 1.

<sup>4</sup> *Senate Election Cases*, 216-17. This precedent may be cited in some more serious case in the future. Recent experience has called attention to the fact that the Constitution does not designate who shall determine when the 'inability' of the President is such that the Vice-President shall assume the duties of his office. In case a Senator-elect becomes insane before taking his seat, or if a Senator's mind becomes 'no longer subject to the control of his will,' would it be competent for the Senate to inquire into his 'qualification' for holding his seat?

As to the scope of the 'qualifications' of which the Senate is made the judge, Charles Sumner declared:

A Senator failing in either of these (age, citizenship, or inhabitancy in the state) would be incompetent by the letter of the Constitution; but the Republic might not suffer from his presence. On the other hand, a Senator failing in loyalty is a public enemy whose presence in this Chamber would be a certain peril to the Republic. It is vain to say that loyalty is not declared to be a 'qualification.' I deny it. Loyalty is made a 'qualification' in the amendment to the Constitution; and then again in the original text, when in the most solemn way possible it is distinguished and guarded by an oath. Men are familiarly said to 'qualify' when they take the oath of office, and thus the language of common life furnishes an interpretation to the Constitution.<sup>1</sup>

During the decade of the Civil War it was twice sought to apply the test of loyalty to Senators-elect from states which had not seceded. In 1862 the Committee on the Judiciary, to which had been referred the credentials of Benjamin Stark, reported, 'without expressing any opinion as to the effect of the papers before them on any subsequent proceedings in the case,' that Stark was entitled to take the oath. In vigorous dissent from his colleagues on the committee, Lyman Trumbull insisted that the committee ought to have 'expressed its opinion on the evidence of disloyalty before it, and to have reported in favor of or against the swearing in of the Senator, as the evidence should warrant, and not allow him to be first sworn, and leave the question of his loyalty to be subsequently determined on a motion to expel.'<sup>2</sup> Stark was sworn in; but later a select committee, instructed to investigate the charges against him, with but one member dissenting reported: 'The Senator from Oregon is disloyal to the Government of the United States.' Nevertheless, with surprising leniency in view of Stark's words and deeds as presented in the evidence, the Senate by a vote of 16 yeas to 21 nays defeated the resolution that Stark, 'who has been found by a committee of this body to be disloyal to the Government of the United States, be . . . expelled from the Senate.'

<sup>1</sup> Speech in the Senate, Feb. 13, 1868, *Cong. Globe*, 1145.

<sup>2</sup> *Senate Election Cases*, 284-97. It should be noted that the procedure under the precedent established in the cases of Stark and Smoot is more lenient to the accused than that which Trumbull advocated. A mere majority may prevent a claimant's being sworn in as a Senator, but when he has been sworn in, he can only be expelled 'with the concurrence of two-thirds.' By a mere majority, however, his seat may be vacated because of the invalidity of his election, as shown by investigation after he has taken the oath.

Less charitable was the Senate's decision, five years later, when, rejecting its committee's recommendation that Philip F. Thomas of Maryland be admitted to his seat, the Senate, under the spell of Sumner's vindictive exhortation, determined by a vote of 27 to 20 that the Senator-elect, 'having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Senator.' The one damning deed charged against him was that, when his minor son had announced to him that he was going to join the Confederate army, the father, while with tears in his eyes protesting against the boy's going, did give his son one hundred dollars, specifically telling him that it was done that he might have a sum of money with him, in case he were imprisoned or in suffering!<sup>1</sup>

A generation had passed before this question of the loyalty of a Senator-elect was again raised, and then under far different conditions. On the very day (February 23, 1903) when the credentials of Reed Smoot were presented to the Senate, there was presented a memorial, signed by eighteen citizens of Utah, protesting against his being 'permitted to qualify by taking the oath of office or to sit as a member of the United States Senate.' Although the House of Representatives had entered upon a long and bitter controversy over the swearing-in of Brigham H. Roberts, a Utah polygamist, which resulted in his exclusion,<sup>2</sup> in the Senate — after a statement by Hoar of what the Chairman of the Committee on Privileges and Elections, Burrows, understood to be 'the orderly and constitutional procedure' in regard to administering the oath to persons presenting proper credentials — without objection Reed Smoot was allowed to be sworn in, March 5, 1903. Ten months later a resolution submitted by the same Chairman of the Committee on Privileges and Elections resulted in the authorizing of that committee 'to investigate the right and title of Reed Smoot to a seat in the Senate.' More than two years had passed before the committee submitted its report, with a resolution declaring Smoot not entitled to the seat which he had already held for three years.<sup>3</sup> The report cited various precedents sustaining the view that a Senator

<sup>1</sup> *Senate Election Cases*, 333-39. The other fact emphasized by those opposed to the seating of Thomas was that he had resigned his office in the Buchanan Cabinet. See remarks of Doolittle, *ibid.*, 336-37.

<sup>2</sup> Roberts was excluded from the House as 'a notorious, demoralizing and audacious violator of State and Federal laws relating to polygamy and its attendant crimes.'

<sup>3</sup> June 11, 1906.



might be deprived of his seat as being unfit to perform the important and confidential duties of a Senator, although he might have done no act of which a court of justice could take cognizance, and affirmed that 'Reed Smoot comes here, not as the accredited representative of the State of Utah, but as the choice of the hierarchy which controls the church and has usurped the functions of the State in said State of Utah.'<sup>1</sup> Over the question whether the case should be handled as one of expulsion, the committee was hopelessly divided. Bailey, though joining in the majority report, in debate avowed his belief that Smoot could be deprived of his seat only by expulsion. Five members of the committee joined in a minority statement that in their opinion there was 'no just ground for expelling Senator Smoot or for finding him disqualified to hold the seat he occupies because of the fact that he, in common with all the people of his State, has not made war upon, but has acquiesced in, a condition for which he had no original responsibility.'<sup>2</sup> As to the 'endowment rites oath,' by the taking of which Smoot was said to have bound himself to make his allegiance to the church paramount to his allegiance to the United States, the minority characterized the testimony which had been presented on that point as 'limited in amount, vague and indefinite in character and utterly unreliable because of the disreputable and untrustworthy character of the witnesses.'<sup>3</sup>

The debate upon the resolution dragged through nearly three months, the final stage being reached February 20, 1907, almost four years to a day after the filing of Smoot's credentials. Before the resolution was submitted to a vote, on motion of a minority member of the committee it was amended by inserting an introductory phrase, so as to read: 'Resolved: Two-thirds of the Senators present concurring therein, that Reed Smoot is not entitled to a seat in the Senate

<sup>1</sup> Smoot was one of the twelve 'Apostles of the Church of Jesus Christ of Latter Day Saints.' He was not a polygamist.

<sup>2</sup> Foraker, Beveridge, Dillingham, Hopkins, and Knox — all Republicans.

<sup>3</sup> Smoot made a 'very clear, concise, frank and full statement' of his position, Feb. 19, 1907. (*Cong. Rec.*, 3268-70.) As to his personal attitude toward polygamous marriages he said: 'In my opinion any man who has married a polygamous wife since the manifesto should be prosecuted, and, if convicted, should suffer the punishment of the law; and I care not who the man might be, or what position he might hold in the church, he should receive the punishment pronounced by the law against the crime.' Upon the question of divided allegiance he said: 'I have never taken any oath or obligation, religious or otherwise, which conflicts in the slightest degree with my duty as a Senator or as a citizen. I owe no allegiance to any church or other organization which in any way interferes with my supreme allegiance in civil affairs to my country, an allegiance which I freely, fully, and gladly give.'

as a Senator from the State of Utah.' <sup>1</sup> This resolution was defeated by a vote of 28 yeas to 42 nays.<sup>2</sup>

The question whether a Senator might be excluded because of offenses alleged to have been committed prior to his election and having no connection therewith was raised under dramatic circumstances a generation later. December 6, 1926, as Senator-elect Arthur R. Gould advanced to take the oath, that ceremony was interrupted by the introduction of a resolution by Walsh (Montana) reciting a passage from a formal opinion delivered by a New Brunswick judge in which he declared a certain contract void 'because of the act of bribery committed by Mr. Arthur R. Gould during the negotiation' between the Province and the railway company for the building of a certain railroad.<sup>3</sup> The Walsh resolution provided that the qualifying oath be administered to Gould, and that the Committee on Privileges and Elections be directed to inquire into the truth of the charges and make such recommendation as might seem to them warranted. The resolution 'went over,' and Gould was forthwith sworn.<sup>4</sup> The following day the resolution called forth a searching debate, turning mainly upon the question whether 'qualifications,' as used in the Constitution's grant to each House of the power to 'judge of the qualifications' of its members, should be interpreted as including only the specified requirements as to citizenship, residence, and age, or should be held to cover the question of general fitness on moral grounds. Borah and Walsh, with full citation of precedents, upheld the Senate's right to judge of the moral fitness of a man to be a member of that body. Reed (Pennsylvania), who was soon to bear the brunt of the defense of Vare's claim to a Senate seat, insisted that the Senate could 'judge' only of the age, citizenship, and residence of a Senator-elect; it was for the people of his state to determine whether they were satisfied in other respects to have him represent them in the Senate. Gould's colleague declared that the bribery charges had been

<sup>1</sup> In a Senate in which Republicans held 57 seats and Democrats 33, the party line-up on this decisive vote was: Yeas, Republicans, 9; and Democrats, 19; nays, Republicans, 39, and Democrats, 3. The case is fully reported in *Senate Election Cases*, 928-86. Taking part in this decision of a contest which had agitated the Senate for four years were one Senator who had been sworn in three weeks and another who had been sworn in nine days before the final vote.

<sup>2</sup> A substitute amendment, offered by a Democrat, that Smoot 'be expelled from the Senate,' had been lost by a vote of 27 to 43.

<sup>3</sup> It was alleged that in 1912 Gould had given to a former premier of New Brunswick \$100,000 to overcome his 'hold-up' of the necessary grant.

<sup>4</sup> Dec. 6, 1926, *Cong. Rec.*, 8.

fully aired during the campaign, that Gould had answered them in a printed statement and on the stump, and that, with thorough familiarity with the whole transaction, the voters had given him the greatest majority, in proportion to the vote cast, that had ever been received in Maine.<sup>1</sup> The resolution was agreed to by a vote of 10 to 1, and a subcommittee proceeded to hold hearings, at which Gould himself testified. Some weeks later, in accordance with the unanimous opinion of its subcommittee, the Committee on Privileges and Elections reported to the Senate, completely exonerating Gould, but expressing no opinion on the important constitutional questions touching the power of the Senate in the premises.<sup>2</sup>

---

### THE ELIGIBILITY OF SENATORS TO APPOINTIVE POSITIONS

---

The 'courtesy of the Senate' ordinarily accords to the nomination of a present or past Senator immediate and unopposed confirmation, provided question is not raised as to his eligibility for the specific position, in accordance with the Constitution's requirement:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time. (Art. I, sec. 6, par. 2.)

In the Federal Convention there had been wide differences of opinion as to whether any such limitation was desirable, and, if so, as to its scope. Mason and Gerry held very cynical views of legislators and their motives. Mason referred to 'the shameless partiality of the legislature of Virginia to its own members.' Williamson declared that

<sup>1</sup> Note the brief of Price Wickersham, on 'The Right of the Senate to Determine the Qualifications of its Members,' maintaining: 'The Constitution expressly confers the power without limitations upon the Senate; the intent of the framers of the Constitution is plain; history supports the power; the practice of the colonies upholds the power; the best governmental policy demands that the senate exercise the power.' (70th Cong., 1st sess., S. Doc. 4.) Dec. 7, 1926, *Cong. Rec.*, 8, 38-44.

<sup>2</sup> March 4, 1927, *ibid.*, 5914. Even Caraway reported: 'There is no question in the minds of the committee that he is entitled to his seat without any cloud.' A year later the Senate voted that \$10,906.04 be paid to Gould 'in full reimbursement for all expenses incurred in defending charges made against him and ordered to be investigated by the previous resolution.' (April 30, 1928.)



office-hunting had been the source of almost every corrupt measure in the legislature of his state. Sherman thought that the Constitution should lay as few temptations as possible in the way of those in power. Several delegates favored making members ineligible not only during the term for which they had been elected but for a year thereafter.

On the other hand, some of the ablest men in the Convention opposed barring members of the House and Senate from appointment. Pinckney held that such an exclusion was degrading to members of the National Legislature, and that it was inconvenient because the Senate might be supposed to contain the fittest men. 'He hoped to see that body become a school of public ministers, a nursery of statesmen.' Wilson and Mercer felt that such a limitation would lessen the attractiveness of the National House and Senate, and lead 'all the most influential men to stay at home, and prefer appointments within their respective states.' Gouverneur Morris raised the question, 'Why should we not avail ourselves of their services, if the people choose to give them their confidence?' and called attention to the embarrassment that would be caused in case of a war emergency, if the citizen most capable of conducting it should happen to be a member of Congress.

Not until within a fortnight of the end of its sessions was the Convention brought to the compromise whereby the ineligibility which had been applied to all offices was confined to those 'created, or the emoluments of which shall have been increased' during the term for which the nominated Representatives or Senators shall have been elected. Pinckney thought that even this provision would exclude 'members of the first legislature (which will be composed of the ablest men to be found), from the great offices, even those of the judiciary, which are to continue for life.'<sup>1</sup>

The people at large, distrustful of delegated power, favored insistence upon this ineligibility. Among the amendments which the Virginia and North Carolina Conventions suggested before ratifying the Constitution was one declaring the members of both branches of Congress ineligible to federal office during the time 'for which they

<sup>1</sup> It had precisely that effect in the case of Washington's nomination, Feb. 27, 1793, of William Paterson, to be a Justice of the Supreme Court. The next day he sent a message to the Senate: 'It has occurred to me that he was a member of the Senate when the law creating that office was passed, and that the time for which he was elected is not yet expired. I think it my duty, therefore, to declare that I deem the nomination to have been null by the Constitution.' Within a week, March 4, 1793, Paterson's term in the Senate expired. Then his renomination was at once confirmed. Charles Warren, *op. cit.*, III, 102, n. 2.

shall be respectively elected.' In response to this sentiment and probably to instructions from the legislature, proposals were introduced in the First Congress for amending the Constitution so as to make the ineligibility general, and similar proposals were introduced in the Eleventh and Twentieth Congresses. But they aroused no enthusiasm. Speaking in apologetic tone of his own appointments of Senators and Representatives to foreign missions, President Monroe indicated that in principle he did not approve of such appointments, but that, since the practice had been long established, and Congress could not be satisfied with discrimination against its members' eligibility, it had not seemed best to 'make it a rule for himself.'<sup>1</sup> Furthermore, in many cases there were not unworthy reasons for such legislators' availability for appointment; they were men whose character and ability were known, and they could be persuaded to leave Washington during their congressional service or immediately thereafter, whereas a few months later they would have been re-established in some business or profession which they would be unwilling to leave.<sup>2</sup>

In communicating the announcement of his resignation from the Senate in 1825, Jackson took occasion to recommend that members of Congress by amendment of the Constitution should be made ineligible for federal office not only during their term but for two years thereafter.<sup>3</sup> The only suggested exception that he made was in the case of judges. With startling inconsistency, four years later he named five of the six members of his Cabinet from Congress, and within three months appointed in addition from Congress three foreign ministers and four other important officers.<sup>4</sup>

The executive acts which have been most reprobated as violations of this disqualification have been the appointment of Senators or Representatives (without even consulting the Senate in many cases) as executive agents on special missions, or as members of commissions to negotiate treaties, to attend conferences, or pursue investigations. The key question which critics of the Executive always raise is

<sup>1</sup> J. Q. Adams, *Memoirs*, IV, 72. The total number of members of Congress who received appointments from President Monroe during their terms of service or within one year thereafter was thirty-five. L. M. Salmon, *op. cit.*, 47, n. 3.

<sup>2</sup> J. Q. Adams stressed this point as explaining Rufus King's willingness to accept appointment as Minister to England, just as he was about to leave the Senate to go into private business. *Memoirs*, VI, 522-23.

<sup>3</sup> W. G. Sumner, *Life of Jackson*, 104. Everyone understood that in urging this amendment Jackson had in mind Clay's recent appointment as Secretary of State.

<sup>4</sup> His biographer says that in one year Jackson appointed more members of House or Senate to office than had any one of his predecessors in a whole term. *Ibid.*, 147.

whether such positions are 'civil offices under the authority of the United States.' Referring primarily to executive agents, Professor Edward S. Corwin writes: 'Such appointments usually lack the prime tests as "office" as laid down by the Court: tenure, duration, emolument, and duties. They are transient, occasional, incidental.' It may perhaps be held that on this basis 'special agents,' of the sort there discussed, are 'not only not "public ministers," but that they are not "officers" at all!'<sup>1</sup> But in his view the constitutionality of the appointment of a Senator or Representative to act in a diplomatic capacity 'is open to grave doubt, to say the least.'

In comparatively recent years, McKinley and Harding have been the Presidents whose appointments of Senators have aroused most criticism as to their eligibility. Hoar declared that McKinley made what was before an individual and extraordinary instance, a practice, and added: 'If that practice continues, it will go far, in my judgment, to destroy the independence and dignity of the Senate.' At request of his colleagues upon the Judiciary Committee, he conferred with the President, and a better understanding was reached.<sup>2</sup>

At the end of the World War, for the Peace Mission which was to go with him to Paris President Wilson named no member of the Senate. This omission Senators seemed to resent, despite their professed disapproval of senatorial service upon such commissions.<sup>3</sup> In the struggle over ratification, the Treaty of Versailles, as contrasted with the Treaty of Paris, could not be explained or defended on the floor of the Senate Chamber by members who had actively participated in its negotiation.

'Back to McKinley' was the slogan in the campaign for the election of Harding. As President he reverted to the practice of that predecessor, not only in his main reliance upon Senators to sponsor nominations, but also in his selection of members of the Senate and House for service on commissions. To represent the United States in the Washington Conference he associated with the Secretary of State the Republican Senate leader and Chairman of the Committee on Foreign Relations (Lodge), and the minority leader (Underwood) — the two Senators whose action would carry most weight for or against the ratification of the treaties that were about to be negotiated.

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States*, I, 528-29. *U.S. v. Hartwell*, 6 Wall. 385.

<sup>2</sup> G. F. Hoar, *op. cit.*, II, 47-49. Note his comment on Senator George Gray's membership in the mission that negotiated the Treaty of Paris.

<sup>3</sup> Page 696.



The next controversy over the question of eligibility came upon the nominations of Senator Reed Smoot and Representative Theodore E. Burton as members of the World War Foreign Debt Commission. Two nominees from the Cabinet, Hughes and Hoover, were promptly approved by the Senate, while by the Allied Debt Act the Secretary of the Treasury, Mellon, was named chairman and therefore in his case confirmation was not required. Walsh (Montana) took the lead in opposing appointment of the two congressional members.<sup>1</sup> He maintained that there was no constitutional objection whatever to the appointment of members of Congress upon commissions vested with no authority except to investigate and report to Congress; nor did he find objection to the appointment of members — as in the case of Lodge and Underwood — to negotiate treaties which are afterwards to be submitted to the Senate for ratification.<sup>2</sup> But he insisted that whenever commissions are vested with power to deal with finality with a matter with respect to which they are authorized to act, they then become 'officers of the United States,' and fall under the Constitution's inhibition as to eligibility of members of the House or Senate. He declared that in his opinion both of the nominees in question were 'pre-eminently fitted for the position.' The question of their eligibility was referred to the Committee on the Judiciary, which presently reported adversely.<sup>3</sup> Meantime, in an opinion submitted at request of the President, Attorney-General Daugherty, while holding the Constitution's provision 'wise and salutary,' said: 'It seems to me to strain the language to apply it to a mere temporary appointment without compensation, and purely of an advisory capacity, and intended to serve a temporary emergency.'<sup>4</sup> The Senate's final action

<sup>1</sup> Walsh discussed this question at length, Feb. 22, 1922, and Feb. 23. (*Cong. Rec.*, 2894 ff., 2942 ff.) His citations are numerous, especially to Hoar's speeches and to the notable Henderson report, at the time of McKinley's nomination of members of Senate and House to the commission to visit Hawaii. The Supreme Court decision most often cited was Hartwell's case (6 Wall. 3850) containing the definition of 'office': 'The term "office" embraces the idea of tenure, duration, emolument, and duties. The duties must be continual and permanent, not occasional or temporary.'

<sup>2</sup> On this point contrast his opinion with that of Hoar, to whose authority he frequently appealed. Hoar had held: 'If Senators who negotiate a treaty come back with it and it is laid before the Senate, how can any of their associates argue to their minds in debate here the wisdom of such a measure? They come pledged beforehand. Before their senatorial duty begins another duty has affected and influenced their minds.' (Quoted by Walsh from Hoar's speech in the Senate, Feb. 26, 1903.)

<sup>3</sup> S. Rept. 563, April 11, 1922, *Cong. Rec.*, 5257 ff. The report was signed by nine — six Democrats and three Republicans; the minority's views were signed by seven Republicans.

<sup>4</sup> March 8, 1922.

followed more than five hours of debate in executive session. Despite the adverse report of the committee, the nominations were confirmed by a vote of 47 to 25.<sup>1</sup>

In the early months of 1930 the naming of Senators David A. Reed and Joseph T. Robinson as members of the United States Delegation to the London Naval Conference aroused little adverse comment.<sup>2</sup> Upon their return, the Senate took a brief recess on the occasions when each of them came first to the Chamber, to give their colleagues a chance to greet and congratulate them. Leaders of both parties cordially supported the resolutions for tendering these receptions, and there was no hint that these Senators' participation in that conference was regarded as anything else than a fitting representation of the Senate by members who had honored that body by rendering a distinguished service.<sup>3</sup>

The mere fact that the 'emoluments' of an office have been increased during the time for which a Senator was elected makes him ineligible for appointment to that office; but the barrier may not prove insurmountable. Some weeks before his inauguration, President-elect Taft announced his choice of Senator Knox for the post of Secretary of State. A bill was promptly introduced in the Senate to repeal that portion of an Act of 1907 increasing the salary of the Secretary of State from \$8000 to \$12,000.<sup>4</sup> The President-elect telegraphed to Senator Hale, to Speaker Cannon, and to House Floor Leader Payne, expressing his hope that this bill would pass, adding: 'I should regard the loss of Senator Knox from the first place in my Cabinet as a public misfortune.'<sup>5</sup> In the Senate the bill was promptly passed, with no opposition. In the House, however, its course was not so smooth. A motion, intended to railroad it through without report from the committee to which it had been referred, was defeated; but the

<sup>1</sup> April 11, 1922, *Cong. Rec.*, 5257. The roll-call, made public by order of the Senate, showed that two Democrats had voted for confirmation, and three Republicans had voted against it. The Report and the Views of the Minority were also printed in the *Record* (5251-68). They included many citations from previous discussions of eligibility. It should be noted that in the *Record* of March 2, 1905, there was included, in a speech by Senator McComas, a summary of the appointments as commission members or executive agents, whose 'eligibility' had raised comment, 1789-1905.

<sup>2</sup> Their names were not sent to the Senate for confirmation.

<sup>3</sup> *Cong. Rec.*, 8038 and 8474, May, 1930.

<sup>4</sup> As Attorney-General, in March, 1903, Mr. Knox was asked to pass upon the nomination of an outgoing Representative, Page Morris, for a newly created judgeship and ruled him ineligible.

<sup>5</sup> Feb. 12, 1909, Mr. Taft gave to the press the telegrams exchanged between him and Knox on this matter, and his own to Hale.

Committee on Rules succeeded in getting consent to a special order by which it was brought before the House that same day, with forty minutes allowed for debate, equally divided between those who favored and those who opposed the bill. Little was said in its defense; on the other hand, some of the leading members of both parties made protest against it as 'not only unconstitutional but also preposterous.'<sup>1</sup> But the bill was passed by a large majority, and in accordance with its provisions Knox became Secretary of State at a salary of \$8000. Two years later, when the term for which he had been elected to the Senate was about to expire, the salary of the Secretary of State, dating from March 5, 1911, was raised to \$12,000.<sup>2</sup>

This same section of the Constitution, which had caused President Washington to recall from the Senate the nomination of Senator Patterson for Associate Justice of the Supreme Court because he deemed it 'to have been null by the Constitution,' and which had caused President-elect Taft to resort to this elaborate 'detour' in order to secure the confirmation of his proposed nomination of Senator Knox for Secretary of State, was the basis upon which some of the ablest constitutional lawyers in the Senate, of both political parties, challenged the eligibility of Senator Hugo L. Black, when he was nominated for Associate Justice of the Supreme Court. Whether by the retirement of Associate Justice Van Devanter there was caused a vacancy in the Supreme Court which Black was to fill, or whether his office would be a newly created one — in either case these Senators insisted that he would be ineligible for such appointment until the expiration of his Senate term, January 4, 1939.<sup>3</sup> They laid stress upon the great amount by which, under the Judiciary Retirement Act of March 1, 1937, the 'emoluments' of Justices of the Supreme Court had been increased. But these arguments from the Constitution had no weight to induce the President to withdraw the nomination, nor the Senate to delay its confirmation.

At the first session of the Supreme Court, October 4, 1937, when the new Associate Justice took his seat, the Court consented to receive and take under advisement two petitions requesting that the Court determine his eligibility. The following week, Chief Justice

<sup>1</sup> Feb. 15, 1909. See speeches by Representatives J. R. Mann, Bourke Cochran, and J. S. Williams, *Cong. Rec.*, 2390-2401, 2412. The bill was passed by a vote of 173 to 116.

<sup>2</sup> Acts of Feb. 17 and March 4, 1911.

<sup>3</sup> Senators Borah, Burke, Austin, and White, in debates of Aug. 14, 16, and 17, 1937.



Hughes announced the Court's decision that the petitioners had no direct interest in the matter:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action, and it is not sufficient that he has merely a general interest common to all members of the public.

There is here no intimation of what would be the opinion of the Court if a litigant should appear who was able to demonstrate such a direct interest in the eligibility of Senator Black for appointment to the Supreme Bench.<sup>1</sup>

#### PUNISHMENT FOR DISORDERLY BEHAVIOR

---

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

There have been several assaults or threatened assaults in the Capitol, in which Senators have been involved, that have raised question as to the scope of the Senate's power to punish such offending members.

*Senators Benton and Foote.* (April 17, 1850.)

Benton (Missouri) and Foote (Mississippi) had clashed sharply in debate. While Foote was replying in kind to Benton's provocative speech, Benton rose angrily from his seat and strode toward Foote's chair. Seeing his threatening approach, Foote stepped toward the secretary's table, at the same time drawing and cocking a pistol. Members intervened. Benton returned to his seat and Foote surrendered his pistol.

<sup>1</sup> Under the same section of the Constitution arose question as to eligibility when in 1934 Senator Robert F. Wagner was appointed Chairman of the National Labor Board. He was a member of the Senate when that Board was created, and had had much to do with the passage of the N.I.R.A. He did not resign from the Senate. He continued to serve for several months as chairman, but without salary or allowances, and without taking an oath as chairman.

The matter was referred to a select committee. After several weeks the committee reported on the facts, deplored the whole scene as most discreditable to the Senate, and declared that both Benton and Foote were seriously at fault. The committee recommended no action to the Senate, but expressed the hope that this condemnation would be 'a sufficient rebuke and a warning not unheeded in the future.' No further action was taken.<sup>1</sup>

*Brooks's Assault upon Charles Sumner.* (May 22, 1856.)

The facts as to this assault are familiar. As Sumner sat writing at his desk in the Senate Chamber, after the adjournment of the Senate, Congressman Preston S. Brooks, incensed by some portions of Sumner's recent speech, denounced him and broke a thick walking-stick over the Senator's head. The committee appointed to investigate this matter reported that the assault was a breach of the privilege of the Senate, but held that the offense could only be punished by the House of Representatives, of which Brooks was a member. This report was sent to the House. Its committee declared the assault to be a breach of the privilege of the House, as a co-ordinate branch of the Government, and recommended that Brooks be expelled, and that two members of the House who had abetted him be censured. The vote of 121 to 95 in favor of this action fell far short of the requisite two-thirds. Brooks thereupon made a braggart's speech, announced his resignation, and strode from the Hall, to receive every kind of plaudit from his Southern admirers. Within three weeks both he and Keitt, one of his friends who had resigned under censure, were back in their seats, each 'vindicated' by re-election by a practically unanimous vote.<sup>2</sup>

*Senators Tillman and McLaurin.* (February 22, 1902.)

In McLaurin's absence, Tillman declared in a speech in the Senate that improper influences had been used in changing the vote of his South Carolina colleague upon the treaty which ended the Spanish-American War. McLaurin, returning to the Chamber, rose to a question of personal privilege. He declared that on the floor of the Senate he had replied to those insinuations and declared that they were not true, and added: 'I now say that that statement is a willful, malicious, and deliberate lie.' Tillman jumped forward and struck

<sup>1</sup> George P. Furber, *Precedents*, 91.

<sup>2</sup> *Ibid.*, 94-98; George H. Haynes, *Charles Sumner*, 204-12.

McLaurin in the face, and they fought till separated by a Senate official and several Senators. Immediately order was given for an executive session; the doors were closed and the galleries cleared. Before action was taken, it was stated that each of the Senators had already expressed the wish to address the Senate in apology. A resolution was passed, in executive session, that, on account of the altercation and personal encounter, the two Senators be 'declared in contempt of the Senate, and the matter be referred to the Committee on Privileges and Elections with instructions to report to the Senate what action shall be taken in relation thereto.'

Question was raised whether the Senators, having already been declared in contempt of the Senate, could now be recognized to address the Senate. There was general agreement that they could not be thus recognized unless specifically permitted to address the Senate by its own vote. The motion was then passed: 'That the two Senators from South Carolina shall now be given the floor and be recognized by the Chairman in order that they may in their own way proceed to purge themselves of the charge of contempt, of which they have been adjudged guilty by the Senate.' Each Senator then made a brief speech of regret and apology.

Though the report of the committee set forth clearly the difference in the seriousness of the offenses committed by the Senators, its recommendation did not differentiate between them. Minority members of the committee and some other Senators expressed the belief that Tillman as the aggressor deserved suspension from participation in the proceedings of the Senate for a longer period than McLaurin — if, indeed, any further suspension should be imposed upon the latter. But the Senate adopted the recommendation of the committee:

That it is the judgment of the Senate that the Senators from South Carolina . . . for disorderly behavior and flagrant violation of the rules of the Senate . . . deserve the censure of the Senate, and they are hereby censured for their breach of the privileges and dignity of this body; and from and after the adoption of this resolution, the action adjudging them in contempt of the Senate shall be no longer in force and effect.

This resolution was adopted by a vote of 54 to 12, twenty-two Senators not voting. The penalty, thus, was censure, and suspension for the six days<sup>1</sup> — which had already elapsed since the assault!

<sup>1</sup> *Cong. Rec.*, 2087; 2203-07, Feb. 22 and 28.



---

EXPULSION

---

Each House may...with the concurrence of two-thirds, expel a Member.

In the Convention's debate on expulsion the phrase 'with the concurrence of two-thirds' was inserted on Madison's motion, he insisting that the right of expulsion was too important to be exercised by a bare majority of a quorum. Gouverneur Morris, on the other hand, held that the power might be safely trusted to a majority. 'To require more may produce abuses on the side of the minority. A few men, from factious motives, may keep in a member who ought to be expelled.'<sup>1</sup>

'The Constitution of the United States has not left the Senate without ample means for protecting itself against the presence of unworthy members in its midst.' In using these words the committee which investigated the first senatorial election contested on the ground of corrupt practices stated an obvious fact. But there has been much difference of opinion as to the scope of that power and the basis upon which it may be exercised.<sup>2</sup> In a considerable number of cases the proper procedure has been much in doubt, and expediency or party advantage may at times have determined the choice.

In quite a number of cases — sometimes at the instance of the Senator concerned — the Senate had authorized an investigation of charges which, if proved, might naturally lead to a motion for expulsion. The alleged criminal acts may have been committed years prior to the accused's entrance to the Senate and have borne no relation to his official service therein. This twilight zone of the Senate's jurisdiction was indicated in the debate over the charges against William N. Roach, Senator from North Dakota. March 28, 1893, there was introduced a resolution directing the Committee on Privileges and

<sup>1</sup> Aug. 10, 1787.

<sup>2</sup> Report on the case of Simon Cameron, 1857. That committee came near to declaring that the investigation of charges of corrupt practices connected with an election belonged to the state; that the Senate was empowered to act for its protection where its members' guilt had been established. *Senate Election Cases*, 264.

Elections to investigate newspaper allegations charging Roach with criminal embezzlement 'and further to report what is the duty of the Senate in regard thereto.' Gorman offered a substitute directing the committee to 'inquire into and consider the question whether the Senate has authority or jurisdiction to investigate charges made against a Senator as to conduct or offenses occurring or committed prior to his election, not relating to his duty as a Senator or affecting the integrity of his election.' These diverse resolutions were debated at length, but no action was taken upon them. Chandler protested against the view that 'there can be no investigation, under any circumstances, into the acts of a Senator, committed before he became a Senator.'<sup>1</sup> In May, 1906, the Senate directed a committee to 'examine into the legal effect of the late decision of the Supreme Court in the case of Joseph R. Burton,' a Senator from Kansas, and, as soon as may be, 'report their recommendation as to what action, if any, shall be taken by the Senate.' Burton had been convicted of violating a federal statute by appearing before the Post Office Department as the paid representative of an alleged 'get-rich-quick' concern, and had been sentenced to six months in jail. He promptly relieved the Senate of embarrassment by resigning.'<sup>2</sup>

The earliest question as to the expulsion of a Senator in our history was formally thrust upon the attention of the Senate by both the President and the House of Representatives. July 3, 1797, President Adams sent to Congress a message setting forth 'the critical situation of our country.' It was accompanied by a copy of a letter, signed 'William Blount,' in which the writer apparently was seeking to

<sup>1</sup> A defalcation, amounting to about \$18,000, was said to have taken place fourteen years before, while Roach was cashier of a bank in Washington, D.C. Most, if not all, of the money had been paid back to the bank and there had been no attempt to prosecute. *Senate Election Cases*, 809-11.

<sup>2</sup> The original precedent in a case of this kind was established in 1796. Humphrey Marshall urged that charges of fraud and perjury against himself be investigated. The Senate adopted its committee's report that the charges could not be sustained and that, 'as the Constitution does not give jurisdiction to the Senate, the consent of the party cannot give it.' *Senate Election Cases*, 168-72.

The Senate was content to take no further action in the cases of Stanley Matthews (1878, *ibid.*, 670-91) and Charles H. Dietrich (1904, *ibid.*, 987-92), after they had been vindicated by the committees which had investigated charges of offenses not connected with their senatorial service. In 1912, after some debate, there was referred to the Committee on Privileges and Elections certain charges of corrupt practices against Henry A. du Pont in connection with an election in Delaware in 1904, with instructions to determine 'whether he is a proper person to retain his seat . . . in this body.' Rising to a question of personal privilege, du Pont emphatically denied the truth of the charges and invited any action which the Senate might deem proper to take. No report was made by the committee. *Ibid.*, 1156-58.

seduce a United States Government interpreter from his duty and to employ him in an enterprise in which the interests of the British and of the Indians would be counter to those of the United States.<sup>1</sup> The matter was referred to a select committee, and at its request the Vice-President addressed a letter to Senator William Blount of Tennessee, requiring his presence in the Senate without delay. He was given permission to be heard by counsel.<sup>2</sup> To the Vice-President's request that he declare whether or not he was the author of the letter, Blount declined to answer. While a request for delay was under consideration, a special message was received from the House of Representatives, accusing Senator Blount of high crimes and misdemeanors, demanding that he be at once 'sequestered from his seat,' and announcing the intention of the House to present articles of impeachment. Witnesses having declared upon oath their opinion that the letter and the signature were in the handwriting of Blount, after a brief debate, by a vote of 25 to 1, in accordance with the committee's finding, it was resolved that Blount, 'having been guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.' This action seriously complicated the impeachment trial which followed a few months later. Had the Senate jurisdiction to try the impeachment of a Senator as a 'civil officer of the United States,' and, if so, could he be tried after he had already, by a practically unanimous vote, been expelled by the Senate?<sup>3</sup>

Ten years later the Senate instructed a special committee to inquire whether it was compatible with the privileges of the Senate that John Smith, a Senator from Ohio, against whom bills of indictment had been found at the United States Circuit Court of Virginia for treason and misdemeanor, should be permitted longer to have a seat therein.<sup>4</sup> The bills against Smith were precisely similar to those found against Aaron Burr, with whom he had been associated; and when, owing to the exclusion of certain evidence, the jury had found Burr 'not proven to be guilty under that indictment by any evidence submitted to them,' the United States counsel forthwith abandoned the prosecution against John Smith. The accused Senator was allowed to appear before the Senate by counsel.<sup>5</sup> The report of the committee,

<sup>1</sup> *Senate Election Cases*, 1165-69; *Annals of Congress* (1797-98), 33-45.

<sup>2</sup> His counsel were not to exceed two. Jared Ingersoll and Alexander J. Dallas thus appeared.

<sup>3</sup> Page 862.

<sup>4</sup> *Senate Election Cases*, 1170-84.

<sup>5</sup> In this capacity the Senate admitted Francis Scott Key and R. G. Harper, but declined to admit Luther Martin.



supposed to have been written by its chairman, John Quincy Adams, was so scathing and so contemptuous of judicial procedure that Pinckney declared that it outraged every distinguished lawyer in America. It declared that Smith, 'by his participation in the conspiracy of Aaron Burr against the peace, union and liberties of the people of the United States, has been guilty of conduct incompatible with his duty and station as a Senator of the United States,' and called for his expulsion.<sup>1</sup> The consideration of this report occupied some fifteen days.<sup>2</sup> The final vote stood 19 yeas to 10 nays — there lacked but a single vote of the two-thirds necessary to expel him. Adams commented: 'He retains his seat, but his conduct is sufficiently reprobated by the state of the votes.' Before the end of the year Smith resigned.<sup>3</sup>

In dealing with the delicate problem of the status of Senators from the Southern States on the eve of the Civil War, the Senate showed great anxiety not to precipitate a crisis. January 1, 1861, a motion was made that the *Journal* be so corrected as to show that Jefferson Davis and certain other Senators, after announcing the secession of the states which they represented, had thereupon withdrawn from the Senate. As an amendment it was moved that their names 'be stricken from the list of Senators,' but both motions were laid upon the table. Not until ten days after Lincoln's inauguration was a resolution finally adopted which, eliminating all reference to secession, ordered that inasmuch as the seats of Jefferson Davis and the other five Senators designated 'have become vacant, . . . the Secretary be directed to omit their names respectively from the roll.'<sup>4</sup>

<sup>1</sup> Its tone may be judged by the following passages. Referring to the Constitution's provisions as to the qualifications of a Senator, it continued: 'Yet, in the midst of all this anxious providence of legislative virtue it has not authorized the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe, can it enter the imagination of a reasonable man that the sanctuary of their legislation must remain polluted with his presence until a court of common law with its pace of snail can ascertain whether his crime was committed on the right or on the left bank of a river; whether a puncture of difference can be found between the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable because present at an overt act or intangible to public justice because he only contrived and prepared? . . . Must the assembled rulers of the land listen with calmness and indifference session after session until the sluggish step of municipal justice can overtake his enormities?' *Senate Election Cases*, 1172-76.

<sup>2</sup> For debate, see *Annals of Congress*, 10th Cong., 1st sess., I, 66-78.

<sup>3</sup> Following the example of John Adair, Senator from Kentucky, who had resigned in 1806, feeling the stigma resulting from his association with Burr.

In 1858 the Senate unanimously agreed to the report of its committee entirely exonerating Henry M. Rice of Minnesota of charges of fraud and extortion, which, if proved, would have led to his expulsion. *Senate Election Cases*, 1185-86.

<sup>4</sup> March 14, 1861, *Cong. Globe*, 1454-56. Brown and Davis, Miss.; Mallory, Fla.; Clay, Ala.; Toombs, Ga.; Benjamin, La.; Iverson, Ga.; Slidell, La.

Four months later the Senate was ready for more drastic language.<sup>1</sup> Rejecting a mild declaration that the names of certain Senators 'be stricken from the roll and their seats be declared vacant,' by a vote of 32 to 10 a resolution was adopted that, whereas the Senators named were 'engaged in the conspiracy for the destruction of the Union, . . . or, with full knowledge of such conspiracy, have failed to advise the Government of its progress or aid in its suppression,' they 'be, and they hereby are, each and all of them expelled from the Senate of the United States.'<sup>2</sup> By resolution passed March 3, 1877, the Senate sought to make *amende honorable* by annulling and revoking this expulsion resolution, 'as far as Senator Sebastian of Arkansas was concerned' — an act highly creditable to the Senate's sense of dignity and justice.<sup>3</sup>

December 4, 1861, without referring the resolution to a committee, with a preamble declaring that he 'has joined the enemies of his country and now is in arms against the Government he had sworn to support,' the Senate, by a vote of 'yeas, 37, nays none,' ordered that 'the said John C. Breckinridge, the traitor, be, and he hereby is, expelled from the Senate.'<sup>4</sup> The following month, in accordance with the report and recommendation of the Committee on the Judiciary,

<sup>1</sup> July 11, 1861.

<sup>2</sup> Mason and Hunter, Va.; Clingman and Bragg, N.C.; Chesnut, S.C.; Nicholson, Tenn.; Sebastian and Mitchell, Ark.; Hemphill and Wigfall, Tex.

<sup>3</sup> A committee, to which had been referred a petition from Sebastian's children, reported, Aug. 2, 1876, in part as follows: 'The loyalty of Senator William K. Sebastian, both before and at the date of the said act of expulsion, is indisputably established; and that he continued ever after to be faithful to the Government and Constitution and Union of the States, notwithstanding every suffering, loss, and adverse circumstances, to the day of his death, in May, 1865; and they find that the expulsion of Senator Sebastian was an error of the Senate, occasioned by want of information, and by the overruling excitements of a period of great public danger; and that it becomes the dignity of the Senate openly to declare the facts, and to render to the name of the Senator and to his survivors every amend and reparation within the power of the Senate and not inconsistent with law.' (44th Cong., 1st sess., S. Rept. 513.) Senator Sebastian's guilt had been assumed to be self-evident, although neither before nor during the consideration of the act of expulsion did he have notice, hearing, or trial upon the same. At that time he was three hundred miles within the Confederate lines, and could escape from them only at the risk of life to himself and family, and the total loss and destruction of his property.

<sup>4</sup> Special resentment seems to have been felt against Breckinridge, who, after having presided over the Senate as its President during the Buchanan Administration, had become a Senator from Kentucky, March 4, 1861. It is said that in his later years 'He always seemed to be looking backward. No doubt he encouraged the belief that some day his disabilities would be removed. Had the National Government conceded this to him, there could be no doubt that he would have been returned to the United States Senate.' (T. C. Martin, *The Great Parliamentary Battle*, 60.) At the time of Breckinridge's expulsion no Senator could afford to have his attitude in doubt. On the day following the vote, a Senator, who had been absent from the Chamber at that time, obtained unanimous consent to have his vote recorded in favor of expulsion.

the two Senators from Missouri — Trusten Polk, 'now a traitor to the United States,' and Waldo P. Johnson, who, 'by his sympathy with and participation in, the rebellion against the Government of the United States, has been guilty of conduct incompatible with his duty and station as a Senator' — were both expelled. The yeas and nays were called for and were grimly recorded, but not a single voice was heard in defense of either.<sup>1</sup>

A resolution calling for the expulsion of Jesse D. Bright of Indiana received far more deliberate consideration. Bright had been a member of the Senate continuously since 1845, and during four sessions had served as its President *pro tempore*. With the resolution there was now referred to the Committee on the Judiciary the astonishing document which formed the basis of the proposed action. Under date of March 1, 1861, he had addressed 'To his Excellency, Jefferson Davis, President of the Confederate States,' a letter commending a friend who purposed to 'visit your capital mainly to dispose of what he regards a great improvement in firearms.'<sup>2</sup> The memorialists declared this letter to be, in their opinion, 'evidence of disloyalty to the United States, and calculated to give aid and comfort to the public enemies.' After a month's deliberation, the committee reported that they believed 'the facts charged against Mr. Bright are not sufficient to warrant expulsion from the Senate.' For ten days the report was under debate; then, contrary to its committee's recommendation, by a vote of 32 to 14 the Senate expelled Bright.<sup>3</sup>

In 1862 there came before the Senate two cases which were cited in the debates during the World War as precedents in regard to the range of freedom and of speech consistent with loyalty. Benjamin Stark had been admitted to the oath, February 27, 1862, after considerable debate as to whether the question of his loyalty ought not first to be determined. The papers relating to the case were later referred to a special committee, which reported that the evidence proved 'that the Senator from Oregon is disloyal to the Government of the United States.' They asserted that the testimony showed that for months prior to November 21, 1861, Stark had been an ardent advocate of the cause of the rebellious states, and that after the formation of the Confederate States he 'had advocated the absorption of the loyal

<sup>1</sup> Jan. 10, 1862, *Cong. Globe*, 126; 70-71; *Senate Election Cases*, 1196-97; 1198-99.

<sup>2</sup> Bright justified his action on the ground that Fort Sumter had not then been fired upon, and that he did not believe that there could be war, but wished to help a friend.

<sup>3</sup> *Senate Election Cases*, 1200-02. Feb. 5, 1862, *Cong. Globe*, 644-55.



States into the Southern Confederacy as the only means of peace, warmly avowing his sympathies with the South.' Stark's reply was that, even if all the statements and affidavits were accepted as true, there are 'merely attributed to me *opinions* which in the field of politics might be regarded as heresies, and *expressions* charged upon me which might be characterized as idle, malicious, and unwise.' He asserted that his accuser's declarations were 'in every respect unjust to my real sentiments and at variance with the whole tenor of my life.' The question finally came before the Senate in the form of a resolution that Stark, 'who has been found by a committee of this body to be disloyal to the Government of the United States, be expelled from the Senate.'<sup>1</sup> This resolution failed to secure the support of even a bare majority.<sup>2</sup>

The only other case of the Civil War period in which expulsion was urged on the ground of disloyalty was that of Lazarus W. Powell of Kentucky.<sup>3</sup> The charge that 'his purposes, if not his acts, were treasonable' was based upon the facts that on June 20, 1861, after eleven states had seceded, Powell presided over a large Southern States' Rights Convention, made a speech stating the purposes of the convention, appointed a committee to draft resolutions, which were unanimously adopted, and which were signed by Powell as president of the convention. These resolutions declared the war being waged by the Federal Administration against the Southern States to be in violation of the Constitution, urged 'the recall of the invading armies,' and the recognition of the Confederate States; declared that Kentucky's proper position at that time was strict neutrality, but that, if either belligerent should invade her soil against her will, she ought to resent and repel it by necessary force. After brief consideration the Committee on the Judiciary reported back the expulsion resolution with the recommendation that it do not pass. In explanation of the committee's action, Senator Trumbull said:

It was not because the committee approved of the doctrine of neutrality in Kentucky. In my judgment that was a most mischievous position, and one wholly untenable. . . . But when the time came that Kentuckians

<sup>1</sup> A dissenting member of the committee declared that in taking his oath Stark had purged himself of these sinister allegations, and added: 'Especially fearing the danger of making mere difference of opinion, however wide and fundamental, a test of fidelity to the Government, I am not prepared to say that Mr. Stark is now disloyal.' (W. J. Willey.)

<sup>2</sup> *Senate Election Cases*, 284-97. The vote was 16 yeas to 21 nays. Stark, who had been appointed to fill a vacancy, served only from Feb. 27 to Sept. 13, 1862.

<sup>3</sup> *Ibid.*, 1203-05.

had to meet this thing face to face, go with the Government or against it, ... Breckinridge and the traitors joined the rebels; the Senator from Kentucky, whose case is now under consideration, came... to the Government of the United States to discharge his duties here. He does not agree with me in sentiment; his opinions are not my opinions;... but he is entitled to his own opinions, and no man is to be expelled from this body because he disagrees with others in opinion. Since Kentucky... took sides with the Union, nothing has been shown to satisfy the committee, at least, that the Senator from Kentucky has had any communication or done anything to favor the cause of the rebellion. I think neutrality did favor it; but, sir, that is now over.

This cool-headed, tolerant view prevailed, and the expulsion resolution was defeated by a vote of 11 to 28.<sup>1</sup>

In two cases during the Civil War and the Reconstruction period the expulsion of a Senator was urged because of his sordid efforts to use his influence as a Senator as a source of private gain. July 14, 1862, the Committee on the Judiciary reported that James F. Simmons of Rhode Island, as charged, had exercised his official influence over certain heads of departments to procure for a client contracts for the manufacture of rifles for the Army and Navy, upon an agreement under which he was to receive \$50,000 in compensation for such service. The committee characterized such action as entirely indefensible and highly improper for a Senator, and cited the disapproval which Congress had shown by promptly passing an act making such conduct a penal offense thereafter. But since the visiting of a severe penalty upon an act which at the time of its commission was not punishable by any public law would 'render the step liable to that objection to which all *post facto* laws are justly subject,' the committee without recommendation reported its findings of fact, that the Senate might 'take such action in the matter as they in their wisdom and discretion may think fit.' Within three days after the submission of this report and before the Senate had acted upon it, Congress adjourned. Before the opening of the next session Simmons had resigned.<sup>2</sup>

The Senate was less smirched than the House by the scandal over the *Crédit Mobilier* of America. February 27, 1873, the Senate Committee, to which had been referred the evidence which had been reported by the House select committee of investigation, made a report exonerating the other Senators who had been under suspicion, but recommending that James W. Patterson of New Hampshire be ex-

<sup>1</sup> March 14, 1862, *Cong. Globe*, 1230-34.

<sup>2</sup> *Senate Election Cases*, 1206-08.

pelled. His term expired during the following week, before the report had been acted upon by the Senate.<sup>1</sup>

The entrance of the United States into the World War inevitably occasioned charges against various Senators for alleged disloyalty in word or deed. In only two cases were they of sufficient weight to call forth any report from the committees to which they were referred. William J. Stone, Chairman of the Committee on Foreign Relations, requested an investigation of certain charges, already referred, that he had obstructed the enactment of measures for the prosecution of the war. Without debate, the Senate agreed to its committee's report that the memorialists mentioned no facts warranting action, and that the record disclosed that, although Stone had opposed the declaration of war, since that time he had voted for all such measures on which a record vote was taken.<sup>2</sup>

That there be instituted proceedings looking to the expulsion of Robert M. La Follette from the Senate, as 'a teacher of disloyalty and sedition, giving aid to our enemies and hindering the conduct of the war,' was the substance of a memorial from the Minnesota Commission of Public Safety, which was referred, October 1, 1917, to the Committee on Privileges and Elections. The occasion for this memorial was a speech delivered by La Follette, September 20, 1917, at a convention of the Non-Partisan League. Rarely has a speech aroused such widespread protest and resentment. Within ten days after its delivery memorials had been presented in the Senate from individual citizens or organizations in ten states, and they continued to come in from all over the country — from New York to Washington and from Minnesota to Louisiana. For he was reported to have said that 'We had no grievances' <sup>3</sup> in entering the war, but that our only motives were to protect the Morgan loans, the profits of munition-makers, and the right of American passengers to sail on munition-carrying ships.

<sup>1</sup> At the next session the Senate ordered that Patterson's *Observations on the Report* be received, printed, and filed with the report. The preamble of this resolution declared that it had been manifestly impossible to consider the expulsion resolution at the end of the previous session without serious detriment to the public business, and that it was 'very questionable if it be competent for the Senate to consider the same after Mr. Patterson has ceased to be a member of the body.' Its failure to take action on the expulsion resolution was therefore not to be interpreted as evidence of approval or of disapproval thereof. *Ibid.*, 1209-11, March 26, 1873.

<sup>2</sup> Oct. 5, 1917.

<sup>3</sup> This was a 'regrettable error' in reporting, as the Assistant General Manager of the Associated Press acknowledged in a telegram to one of the committee, dated May 23, 1918. His actual statement was that 'We had . . . serious grievances. We had cause for complaint.' But his references to them were sarcastic, and implied that they did not justify a declaration of war.



To the subcommittee constituted to pursue the inquiry, La Follette submitted a corrected report of the speech, together with a written statement insisting upon his right to meet face to face any witnesses. But no witnesses were called. At the later hearings La Follette did not appear, but was represented by his counsel, who, in addition to oral argument, submitted two voluminous briefs. His contention was:

It is only by distorting the impromptu retorts of Senator La Follette to the interruptions from the audience into a complete discussion of the intricate causes of the war that anything can be found in the speech to which the most zealous partisans of the administration can object. But under any construction possible to put upon it, it does not even approach to an improper discussion of the war.<sup>1</sup>

Although the hearings in this case occupied but two days, fourteen months had passed before the committee found itself ready to report. Nine of its members — four Democrats and five Republicans — joined in recommending that the petition be dismissed. The chairman and one other member submitted a minority report. They urged that a complete hearing be ordered by the Senate, insisting that La Follette had wholly ignored the real cause of the war, and declared that the constitutional freedom of speech 'never justified the slander of the cause of a country when in the throes of the most terrible war ever waged.'<sup>2</sup>

Senate debate upon the reports was very brief. John Sharp Williams denounced it as 'an everlasting falsehood that we entered this war for the reason stated' in that speech — a speech which he declared was 'disloyal in spirit, disloyal in words, disloyal in intentment, disloyal in effect and disloyal with a set purpose.' But the committee's recommendation — that the resolution that the Senate institute proceedings looking to the expulsion of Robert M. La Follette because of the St. Paul speech be dismissed 'for the reason that the speech in question does not justify any action by the Senate' — was

<sup>1</sup> The briefs of La Follette's counsel, Gilbert E. Roe, printed in the report of the committee and in the *Hearings*, contain valuable summaries of the history of expulsions from the Senate, and of the precedents in regard to *Free Speech as Practiced in War Times*. In these documents were printed the speech as reported in the press of the day, and as corrected by La Follette. It was an extemporaneous speech with many interruptions.

<sup>2</sup> They declared that, relying on no other evidence than the speech itself and the facts recited in the report, 'a grand jury would have been justified in returning an indictment against the speaker for violation of the espionage law, and a petit jury would have been justified in returning a verdict of guilty under that statute.'

agreed to by a vote of 50 to 21.<sup>1</sup> It was a surprisingly generous recognition of the right of freedom of discussion, even at a time of gravest crisis.

## REFERENCES

- 
- Compilation of Senate Election Cases, 1789-1913.* 62d Congress, 3d Session, S. Doc. 1036.
- Rules and Manual of the Senate of the United States.*
- Alexander, De A. S. *History and Procedure of the House of Representatives.* New York, 1916, chapters II and XVI.
- Beck, James M. *The Vanishing Rights of the States.* New York, 1926.
- Ervin, Spencer. *Henry Ford vs. Truman H. Newberry: A Study in American Politics, Legislation and Justice.* New York, 1935.
- Haynes, George H. *The Election of Senators.* New York, 1906.
- Hoar, George F. *Autobiography of Seventy Years.* New York, 1903.
- Luce, Robert. *Legislative Assemblies.* Boston, 1924.
- Rennick, Henry C. *The Powers of Congress in Respect to Membership and Elections.* 2 volumes. 1929. Senior thesis, Department of Politics, Princeton University.
- Woody, Carroll H. *The Case of Frank L. Smith.*
- Published Hearings in Contested Elections:*
- Isaac Stephenson.
- William Lorimer.
- Truman H. Newberry.
- Reed Smoot.
- Earle B. Mayfield.
- Reports of Select (or Special) Committees to Investigate Campaign Expenditures,* especially those in Pennsylvania and Illinois, in 1926 and 1928.
- Supreme Court Decisions:*
- Ex Parte Curtis, 106 U.S. 371.
- Ex Parte Yarbrough, 110 U.S. 643.
- Ex Parte Siebold, 100 U.S. 371.
- Newberry v. United States, 256 U.S. 232.

<sup>1</sup> Thirty-three Republicans and seventeen Democrats supported the resolution, while twenty Democrats and one Republican voted against it. For both reports and for the debate, see *Cong. Rec.* of Jan. 16, 1919.





# V

---

## SENATE OFFICERS AND ORGANIZATION

---

---

★

The Vice-President's chief dignity, next to presiding over the Senate, lies in the circumstance that he is awaiting the death or disability of the President. And the chief embarrassment in discussing his office is, that in explaining how little there is to be said one has evidently said all there is to say.

WOODROW WILSON. (1898)

My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived, or his imagination conceived.

VICE-PRESIDENT JOHN ADAMS. (1793)

He is a dormant President. He is placed in the Chair of the Senate, in a state of preservation for the use when the occasion shall occur. He is politically embalmed in the Chair of the Senate, awaiting the resurrection which the death, political or natural, of the President had been ordained by the Constitution to produce.

SENATOR JOHN ROWAN. (1828)

The great object for us to seek here — for the Constitution identifies the Vice-Presidency with the Senate — is to continue to make this Chamber, as it was intended by the Fathers — the citadel of liberty.

VICE-PRESIDENT COOLIDGE. (March 4, 1921)

---

★

# V

---

## SENATE OFFICERS AND ORGANIZATION

---

### THE VICE-PRESIDENT OF THE UNITED STATES AS PRESIDENT OF THE SENATE

---

#### THE PLANNING OF THE OFFICE IN THE FEDERAL CONVENTION

Was it an afterthought, hasty and ill-advised, that made the Vice-President of the United States the President of the Senate? That assignment was incident to a more important discussion in an entirely different field.

Without previous instructions, the Committee on Detail had inserted in their report the logical provision:<sup>1</sup>

The Senate shall choose its own President and other officers. (Art. IV, sec. 4.)

In case of his (the Chief Executive's) removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States shall be chosen, or until the disability of the President shall be removed. (Art. X, sec. 2.)

Adopted without dissent, for a month these provisions remained unchallenged. They accorded with the then intended choice of the President of the United States 'by the Legislature.' But the triumph of the theory of the separation of the powers, which presently transferred the choice of President from the Legislature to presidential 'electors,' carried with it the corollary that his possible substitute must not be chosen by a branch of the Legislature, lest after becoming President he prove subservient to Congress.

<sup>1</sup> Madison, *Debates*, 343.



Not until September 4, 1787, did the term 'Vice-President' appear in the proceedings of the Convention. The report of the Committee on Unfinished Portions, of that date, made the mode of his election the same as that of the President, and provided: 'The vice-president shall be *ex-officio* President of the Senate.'<sup>1</sup> The reason for making this assignment was thus set forth by Roger Sherman:

If the Vice-President were not to be the President of the Senate he would be without employment, and some other member by being made president [of the Senate] must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom.<sup>2</sup>

The Vice-President, it was recognized, would have to be given 'a respectable salary,' and to the Fathers it seemed unthrifty to make such payment to an officer whose sole function consisted in waiting for the President's chair. Hence, to keep this possible substitute busy and enable him to earn his stipend, he was made President of the Senate, despite the obvious violence which even this assignment did to the theory of the separation of powers.

The proposal was adopted September 7, after only a few moments' discussion. Opponents insisted that the office was unnecessary, and that the Senate, like the House, should choose its own presiding officer, instead of having an outsider thrust upon it by this blurring of functions. Some feared that the Senate would make a tool of the Vice-President. Others predicted that he would become closely intimate with the President, or that his casting vote would give undue weight to his state.<sup>3</sup> The sponsors for the report made light of these objections. In the *Federalist*, Hamilton argued that inasmuch as the Vice-President might become President the same mode of election should apply to both. He insisted that in the Senate the presiding officer should have only a casting vote, and that to put a Senator in the chair would be 'to exchange (in regard to that Senator's state) a constant for a contingent vote.' In popular discussion approval was

<sup>1</sup> Madison, *Debates*, 507.

<sup>2</sup> *Ibid.*, 527. In the opinion of the late Senator Beveridge: 'The deciding vote in the Senate and not the succession to the Presidency was the germ idea from which the Vice-Presidency grew.' ('The Vice-President — The Fifth Wheel in our Government,' *The Century*, Dec., 1909, 208 ff.)

Soon after taking that office, John N. Garner spoke of it as the 'Spare Tire in our Government.'

<sup>3</sup> These points are discussed with great thoroughness in 'Some Aspects of the Vice-Presidency,' by H. Barrett Learned, *Proceedings of the American Political Science Association*, IX, 162-77.

expressed of the Vice-President's being placed over the Senate. As the choice of the people at large, it was argued, he would be likely to be an impartial officer, fitted to give the casting vote.

#### THE INDUCTION OF THE VICE-PRESIDENT INTO OFFICE

April 21, 1789, the two Senators who had been appointed a committee for that purpose waited upon the Vice-President-elect and conducted him to the Senate Chamber. Here he was awaited by the President *pro tempore*, Senator Langdon, who, in behalf of the Senate, congratulated him upon his election and conducted him to the chair. In acknowledging this greeting John Adams said:

Invited to this respectable situation by the suffrage of our fellow citizens, I have thought it my duty cheerfully and readily to accept it.<sup>1</sup>

Nine days before Washington was inaugurated President of the United States, John Adams thus took the seat as President of the Senate. He continued to serve in this capacity until June 3 before taking the oath of office which had been prescribed by the first act passed by Congress.<sup>2</sup>

In recent years more ceremony has attended this act of inducting the Vice-President into office.<sup>3</sup> The usual order of procedure is as follows: A few minutes before noon, March 4, the members of the House of Representatives, preceded by the Speaker, enter the Senate Chamber and are escorted to seats assigned to them. Then come the members of the diplomatic corps, the Chief Justice and Associate Justices of the Supreme Court, the members of the Cabinet, and the highest officers of the Army and Navy. Then, accompanied by the members of the committee on arrangements, the Vice-President-elect enters the Chamber and is conducted to a seat at the right of the Chair, and finally the President and the President-elect of the United States, a few minutes before noon, are announced and are then seated in the space in front of the Secretary's desk. The oath is ordinarily administered to the Vice-President-elect by the outgoing Vice-President, who then makes a brief valedictory address, and at its

<sup>1</sup> *Annals of Congress*, I, 22.

<sup>2</sup> *Ibid.*, 44, approved June 1, 1789. See also *The Nation*, CIV (March 1, 1917), 248-50, 'The Vice-President's Oath of Office,' by H. Barrett Learned.

<sup>3</sup> Edward Stanwood, *History of the Presidency* (1916 ed.), II, 76. 'The scene in the Senate Chamber when Mr. Roosevelt took the oath of office [March 4, 1901] was brilliant in the extreme.'

The Twentieth Amendment's shift of the date of inauguration from March to January will doubtless necessitate changes in the ceremonial.

conclusion declares the Senate of the expiring Congress adjourned *sine die*. The new Vice-President then calls the Senate to order. After prayer by the Chaplain, the Vice-President delivers an inaugural address as President of the Senate. Then there is read the President's proclamation convening the Senate in special session, and the newly elected Senators, each accompanied by his colleague, in groups of four are summoned to the platform, where they take the oath, and subscribe to it in the presence of the Senate.<sup>1</sup> The assemblage then proceeds to the platform at the east front of the Capitol to witness the inauguration of the President of the United States. After this ceremony, the Senate again convenes in its Chamber to receive the President's nominations for positions in his Cabinet.<sup>2</sup> A half-hour executive session usually suffices to secure the confirmation of these appointments, and completes the launching of the new administration.<sup>3</sup>

<sup>1</sup> In 1925 the inaugural ceremony included some unexpected innovations. Vice-President Dawes seized the opportunity to harangue the Senate on its duty to change its rules.

Ordinarily the new members would come to the rostrum in groups of four. Two such groups, solemnly formal, the new Vice-President endured. Then in a tone of impatience he called out the remaining twenty-four and their sponsoring colleagues.

'Bring them all up!' he cried. 'This is too slow! Bring them on together!' (*That Man Dawes*, by Paul R. Leach, 246.) Some observers queried whether the Senate's outburst of criticism was not due less to their new President's assault upon their rules than to his affront to the Senate's dignity in his herding its members 'like a bunch of immigrants' and hustling them through the oath of office.

Before many of them had time to subscribe to the oath, as required by the rule, he gave orders for the carrying forward of 'the inauguration of the President of the United States on the east front of the Capitol.' At the conclusion of those ceremonies the Senators returned to the Chamber, but the Vice-President — wrongly advised by a member of the committee on arrangements — did not appear. After some conference, with no authority Senator Watson took the Chair, and called the Senate to order. An opportunity was given to Senators to subscribe to the oath, an hour for the next meeting was agreed upon, and the Senate adjourned. At the next day's session, a unanimous-consent agreement was secured validating the irregular proceedings of the previous day, and approving the revised *Journal*. (March 4 and 5, 1925, *Cong. Rec.*, 4-8.)

<sup>2</sup> In 1921, President Harding, who cherished his senatorial associations, submitted these nominations in person — an unprecedented procedure.

<sup>3</sup> *Resignation of the Vice-President*. The one instance of the resignation of the Vice-President raised questions as to the formalities to be observed when the Senate's President thus voluntarily relinquishes his office. Vice-President Calhoun, Dec. 28, 1832, resigned his office to accept a seat in the Senate. 'There were no precedents for his act and it has not formed a precedent. He addressed his letter of resignation to the Secretary of State, because that officer receives the returns of the votes for President and Vice-President and transmits them to the President of the Senate. He could not resign to the electoral college, by which he had been elected, for it was no longer in existence; nor to the Senate, because he had not been elected by that body; nor to the President, whose status was the same as his own. . . . There was nobody to accept the resignation. When the Senate met, on Dec. 3, the Vice-President was absent and Hugh L. White of Tennessee was elected President *pro tempore*. No other official notice was taken of Calhoun's absence, and his resignation was never brought before that



## HOW THE FIRST PRESIDENT OF THE SENATE VIEWED HIS OFFICE

With the exception of his 'casting vote,' secured to him by the Constitution, the President of the Senate exercises his powers subject to the Senate's control in 'determining the rules of its proceedings'; and the Senate has chosen to limit the scope of his office practically to that of a parliamentarian. But in the sessions of the First Congress Vice-President Adams was not disposed to allow himself to be relegated to any such position.<sup>1</sup> In his first week in the Chair he declared to the Senate:

I am possessed of two separate powers; the one *in esse* and the other *in posse*. I am Vice-President. In this I am nothing but I may be everything. But I am President also of the Senate.<sup>2</sup>

A few weeks later this duality of function again came in question. Adams expressed to the Senate his doubt as to how that body's address to the President of the United States should be signed. When he said that hitherto he had signed all acts, 'John Adams, Vice-President,' Senator Maclay rejoined:

Sir, We know you not as Vice-President within this House. As President of the Senate only can you sign or authenticate any act of that body.<sup>3</sup>

At the moment, Adams seemed to acquiesce, but a week later he brought the matter up again, saying that he had examined the Constitution and announcing his conclusion thus:

I am placed here by the people. To part with the style given me is a dereliction of my right. It is being false to my trust. Vice-President is my title and it is a point I will insist upon.<sup>4</sup>

body.' (Gaillard Hunt, *John C. Calhoun*, 159-60; *Senate Journal*, 4, Dec. 3, 1832.) Calhoun's able biographer seems to have been unaware of the provisions of the law with which Calhoun's letter of resignation was in precise compliance. In abridged form it read thus: 'The only evidence of a resignation of the office of President or Vice-President shall be an instrument in writing declaring the same, and subscribed by the person . . . resigning, . . . and delivered into the office of the Secretary of State.' (Act of March 1, 1792, sec. 11. See note by Edward Brown, *American Political Science Review*, Oct., 1928.)

<sup>1</sup> Contrast his assertiveness in stretching his office with President Washington's caution in any action which might be 'drawn into a precedent' (p. 46.)

<sup>2</sup> Maclay, *Journal*, p. 3, April 25, 1789.

<sup>3</sup> *Ibid.*, 40. The student of the First Congress finds it hard to decide whether William Maclay is more deserving of his gratitude or of his resentment. 'The suspicious old democrat' has left us deeply indebted to him for the only detailed record of the beginnings of the Senate, a record painstaking and comprehensive. Yet his 'atrabiliar' outlook upon life made him an unconscious caricaturist. Vice-President Adams was Maclay's special *bête noire*. 'Ye Gods, with what indignation do I review the late attempt of some creatures among us to revive the vile machinery (of royalty, nobility and vile pageantry). O Adams, Adams, what a wretch art thou!' (*Ibid.*, 155, Sept. 18, 1789.)

<sup>4</sup> *Ibid.*, 45, May 22.

With great emphasis he declared that he should sign the pending bill as 'Vice-President of the United States and President of the Senate.'

Not only did Adams in personal argument seek to persuade individual Senators, but he interjected his views into the debate without the slightest hesitation. The first session was barely a fortnight old when he was already interrupting Senators to prompt those with whom he agreed and to overbear those from whom he differed. A stickler for forms and ceremonies, he was believed to be the prime mover behind the project to prescribe a 'respectable title' to be used in addressing the President. He reminded one of the speakers that there were "'presidents" of fire companies and of a cricket club.' Another day in a long speech, he exclaimed:

What will the common people of foreign countries, what will the sailors and the soldiers say. 'George Washington, President of the United States?' They will despise him *to all eternity*.<sup>1</sup>

Similarly he took a hand in the debate as to whether the members of the Senate should be styled 'Honorable' in the minutes.

The Vice-President declared from the chair that it was a most serious affair and a vote of the House (Senate) should be taken on it . . . He was against using the word unless 'Right' was added to it . . . If we took the title 'honorable,' it was a colonial appellation and we should disgrace ourselves forever by it; that it was applied to the justices of every court.<sup>2</sup>

A few days later he tried out his pet formula by referring during the Senate debate to what had been said by the 'right honorable gentleman.' Hardly a day passed when his intervention in debate was not recorded. 'Mr. Adams could not sit still in his chair.' — 'Two or three times did his impatience raise him up to talk in a most trifling manner.' — 'Three times did he interrupt Ellsworth.' — 'It was here the Vice-President made us his speech for the day.' 'Up now got the Vice-President, and for forty minutes did he harangue us from the chair.' Indeed, it came to such a pass that Maclay made it a matter of record: 'This day the Vice-President gave us no set speech from the chair.'<sup>3</sup> Yet to himself Adams seemed to be under great restraint. To his wife he confided:

It is, to be sure, a punishment to have to hear other men talk five hours every day, and not be at liberty to talk at all myself, especially as more than half I hear appears to me very young, inconsiderate and inexperienced.<sup>4</sup>

<sup>1</sup> Maclay, *Journal*, 27.

<sup>2</sup> *Ibid.*, 64-65.

<sup>3</sup> *Ibid.*, 137, 140, 278, 33, 27, 31.

<sup>4</sup> John Adams, *Life and Writings*, I, 468.

---

## THE SPEAKER OF THE HOUSE AND THE PRESIDENT OF THE SENATE

---

It may be doubted whether, in scope of power, the presiding officers in the two branches of any other legislature ever presented a greater contrast than did the Speaker of the House and the President of the Senate in the Congress of the United States in the first years of the present century. In the House the Speaker, elected as a party leader, combined the offices of presiding officer and chairman of the majority caucus. He appointed a Speaker *pro tempore* and selected the Chairman of the Committee of the Whole. Before the revolution of 1911 he appointed all committees and selected their chairmen, and, as Chairman of the Committee on Rules, exercised a rigorous control over the formulation of the rules, and the order of the business in the House. As a member of the House, he retained his right to speak and to vote upon any measure. He preserved order within the Chamber. In presiding over the deliberations of the House, his power of recognition was unlimited. In deciding points of order his word was law.<sup>1</sup> He counted a quorum, and refused to entertain dilatory motions.

Speakers became 'czars' because the majority of the House believed that extraordinary power, entrusted to a Speaker chosen by the House from among its ablest and most experienced members, would be effectively exercised for ends which the majority approved. In theory he was the majority's agent, giving effect to its will, and subject to immediate discharge if he abused his powers. But the constitutional law and the electoral process which place a Vice-President of the United States in the Chair of the Senate afford not the slightest assurance that he will be of the party which is in the majority in the Senate, or that in personality or experience he is in the least qualified

<sup>1</sup> De Alva S. Alexander, *op. cit.*, 48-49. Speaker Reed and his successors recognized whom they willed. Alexander declares: 'Even if the Chair refuses an appeal a member must keep silent. "The Chair desires to state," said Speaker Crisp, "that no member has a right, after the Chair has decided a point of order, to ask upon what ground he bases his decisions."' Crisp declined to entertain an appeal by ex-Speaker Reed from a ruling, refused to permit him to explain, and directed the former 'czar' to take his seat, calling upon the Sergeant-at-Arms to see that the order was obeyed.



to preside over its sessions. In effectiveness as presiding officers, our Vice-Presidents have presented extreme contrasts. Thus, Aaron Burr's conduct of the office of President of the Senate won high praise:

Mr. Burr . . . presides in the Senate with great ease, dignity, and propriety. He preserves good order, silence & decorum in debate — he confines the speaker to the point.<sup>1</sup>

But his immediate successor, George Clinton, showed what a misfit presiding officer our system may give to the Senate. On the first day of his service he impressed Senators thus:

He is an old feeble man — he appears altogether unacquainted with our rules — his voice is very weak and feeble — I cannot hear one-half of what he says — he has a clumsy awkward way of putting a question — Preserves little or no order — what a difference between him & Aaron Burr!<sup>2</sup>

Clinton was too old to learn. A year later the same critic listed his failings as a presiding officer, and concluded:

From want of authority & attention to order he has prostrated the dignity of the Senate. His purpose appears good — but he wants mind and nerve.<sup>3</sup>

Yet for more than five years longer this incompetent old man continued to preside over the Senate.

#### POWERS OF THE PRESIDENT OF THE SENATE

From the beginning the Senate has shown a determination to hold within narrow limits the powers to be exercised by a presiding officer not of its own choosing nor responsible to its majority. The 'President of the Senate' is never to be allowed to forget that 'the Senate is a *self-governing* body.'<sup>4</sup> Many illustrations of this vigilant jealousy might be cited. This attitude appears clearly in the Senate's refusal to allow Dallas or his successors to 'delegate the functions of the Chair,' although the President *pro tempore* (chosen by the Senate) is allowed from day to day to name some other Senator 'to perform the duties of the Chair.'<sup>5</sup>

<sup>1</sup> William Plumer, *Memorandum of Senate Debates* (Dec. 8, 1803), 75.

<sup>2</sup> *Ibid.*, 353.

<sup>3</sup> *Ibid.*, 593.

<sup>4</sup> Bacon, in protest against a ruling by Vice-President Sherman, June 4, 1912, *Cong. Rec.*, 7616.

<sup>5</sup> Furber, *Precedents*, p. 186. The Senate disregarded Dallas's designation of a substitute; almost unanimously defeated a resolution that that Senator be appointed President *pro tempore*; but agreed to a resolution that a President *pro tempore* be elected, and at once elected the one he had named. (Rule I, cl. 3.)

The Senate chooses its own minor officers, and the appointing power of its President is confined to the filling of a few non-political positions — for example, the designation of Senators to serve as Regents of the Smithsonian Institution, and as trustees or directors of various philanthropic institutions maintained by the Government. In each case, this power has been conferred by statute, not by the Senate's action.

For a brief period the rules of the Senate authorized the 'Presiding officer' to appoint the standing committees, but they were soon changed so as to reserve that power within the Senate's own control. From time to time it has empowered the President of the Senate to appoint special committees, and to fill vacancies, subject to rule or limitations prescribed by the Senate.<sup>1</sup>

In the early years the Vice-President supervised the *Senate Journal*, and corrected it before it was read; but that power was taken from him more than a century ago.<sup>2</sup> He makes reference of bills to the committees endorsed by their introducers, subject to change on request of the introducer with the assent of the Senate.<sup>3</sup>

Since he is not a member of the Senate, he of course has no vote, except the 'casting vote' assigned to him by the Constitution. Despite John Adams's incessant intervention in Senate debate, later Presidents of the Senate have abstained from such wholesale obtrusion of their views upon that body. Occasionally they have made formal and extended statements, explaining and justifying their rulings which have been called in question. The press commented upon Marshall's having 'ignored the conventionalities' when he apologetically offered a few words of explanation from experience at a time when the Senate was considering the Vice-President's clerical needs; and, when the pending measure providing for an increase in the allowance for his successor had been passed, this three-word speech, 'I thank you!' provoked a laugh.<sup>4</sup> Upon first assuming the Chair, this vice-presidential humorist begged leave to express certain hopes, 'before he enters upon a four-years' silence.'<sup>5</sup> Later he set forth

<sup>1</sup> Page 538. Rule XXLV, cl. 2. In filling vacancies the Vice-President may be called upon to pass upon many delicate questions. For example, in naming Senators to fill vacancies caused by the resignation of members, Vice-President Dawes officially gave recognition to the continuation of the 'Slush Fund Committee,' April 7, 1927, though many Senators of his own party insisted that that committee had passed out of existence upon the expiration of the Congress in which it had been constituted.

<sup>2</sup> Jan. 15, 1824, *Senate Journal*, 106; April 14, 1826, *ibid.*, 240.

<sup>3</sup> Rule 7, cl. 2.

<sup>4</sup> *Boston Herald*, Feb. 11, 1921.

<sup>5</sup> March 4, 1913, in his inaugural address.

that officer's relation in general to Senate debate, when, at the end of weeks of tariff discussion, he said he had been 'like a man suffering from a cataleptic fit; that he knew everything that was going on; that he could not speak; that he had no responsibility.'

In a few instances in debate Senators have apostrophized the Vice-President, sometimes appealing to him to act as the spokesman of the Senate or of the people in laying before the President some need for emergency action. Thus, Clay (March 7, 1834) made a dramatic appeal to Van Buren to make clear to the President the actual disastrous distresses brought upon the country by the failure to recharter the Bank of the United States —<sup>1</sup> a theatrical outburst which the Vice-President chose to treat as political stage-play, although a public meeting in Philadelphia passed a resolution declaring:

Martin Van Buren will deserve and receive the execration of all good men, should he shrink from the responsibility of delivering to Andrew Jackson the message sent by the Hon. Henry Clay.

A generation later, speaking against the annexation of Santo Domingo, Sumner besought Vice-President Colfax to use for the good of his country the opportunities given him by his official position and by his well-known relations of friendship to appeal to the President not to allow the oppression of a weak and humble people.

#### MAINTAINING ORDER

From 1789 to 1828 the rule of the Senate provided:

When a member shall be called to order, he shall sit down until the President shall determine whether he is in order or not.

Early Presidents of the Senate did not hesitate to exercise direct control. Thus, in a forty-minute harangue John Adams lectured the Senate —

found fault with everything almost, but down he came to particulars, and pointedly blamed a member for disorderly behaviour, (the offence being that he had mentioned) the appearance of a captious disposition in the other House.<sup>2</sup>

<sup>1</sup> *Annals of Congress*, 832, March 7, 1834. L. C. Hatch and E. L. Shoup, *op. cit.*, 68-69.

It is said that a few minutes after this florid appeal the Vice-President, whose dislike for Clay was well known, called a Senator to take the Chair, and strolling down to Clay's desk, held out his snuff-box to the orator, as much as to say that his peroration amounted to just 'a pinch of snuff.'

<sup>2</sup> Maclay, *Journal*, 27.



Aaron Burr was not less rigorous: He 'called Mr. Wright to order — declared his observations were very *improper* and *indecent*.' <sup>1</sup>

For the greater part of a decade (1814 to 1825) and for five years almost continuously during the protracted absences from the Senate of Vice-President Tompkins, the Chair was occupied by John Gaillard as President *pro tempore*. Elected by the Senate, he felt entitled to its support, and enforced the rules rigidly.<sup>2</sup> But his immediate successor in the Chair probably did more than any other presiding officer to prostrate the dignity of the Senate. Vice-President Calhoun, hostile to the Administration and ambitious for the Presidency, had no wish to antagonize Senators nor to appear dictatorial. He chose to take upon himself as little power as possible, leaving divisive decisions to be made by the Senate. Accordingly, when John Randolph of Roanoke was indulging in a tirade of bitter abuse of President Adams and Clay, Calhoun let him rave on, instead of calling him to order.<sup>3</sup> Charged with partiality and laxity in his performance of the duties of the Chair, he denied his authority to act:

The power of the presiding officer, on these great points, is an appellate power only; and, consequently, the duties of the Chair commence when a Senator is called to order by a Senator.<sup>4</sup>

<sup>1</sup> Plumer, *Memorandum*, 81. At the end of one day's session in the Chase impeachment trial Plumer noted the following:

Mr. Burr said he wished to inform the Senate of some irregularities that he had observed in the Court. Some of the Senators, as he said, during the trial and while a witness was under examination walked between him and the Managers — others eat apples — and some eat cake in their seats.

Mr. Pickering said he eat an apple — but it was at a time when the President had retired from the Chair. Burr replied that he did not mean him — he did not see him.

Mr. Wright said he eat cake — he had a just right so to do — he was faint — but he disturbed nobody — he never would submit to be schooled and catechised in this manner.

At this instance a motion was made by Bradley, who also had eaten cakes, for an adjournment — Burr told Wright he was not in order — sit down — the Senate adjourned — and I left Wright and Burr scolding.

Really, Master Burr, you need a ferule or birch, to enforce your lectures on polite behavior!

A few days ago he insolently said to the Senate he had thoughts of removing their chairs and desks and having seats. He was told the Senate would not consent to it.

Mr. Burr has for this few weeks assumed the air of a *pedagogue* and rather considered the Senators as scholars than otherwise. (*Ibid.*, 284-85.)

<sup>2</sup> So declared Clayton, June 26, 1856, *Cong. Globe*, 1428.

<sup>3</sup> J. Q. Adams, *Memoirs*, VI, 509; 524.

<sup>4</sup> Speech in Senate, April 15, 1826. His defense is also presented in a series of anonymous letters signed 'Onslow,' published in a Washington paper, and printed in Calhoun's *Works*, VI, 322 ff. These called forth a series of letters in reply, published in the *National Intelligencer*, signed 'Patrick Henry,' and later printed in pamphlet form — *An Argument on the Powers, Duties and Conduct of the Honorable John C. Calhoun, Vice-President of the United States*. At the time it was popularly assumed that these were written by Adams. Later students incline to attribute them to Philip R. Fendall, a clerk in the Department of State, but it is not unlikely that Adams supervised their preparation. It was asserted (p. 56) that the duel between Clay and Randolph never would have taken place had Calhoun discharged his duty and called Randolph to order. (W. M. Meigs, *Life of Calhoun*, I, 315; Gaillard Hunt, *John C. Calhoun*, 58.)

A month later Randolph again used such insulting language toward a colleague that a fight seemed imminent. Not till King from the floor had called Randolph to order did the President of the Senate intervene to order the brawler to sit down. But when King refused to 'write down the exceptionable words' as required by the rule, Calhoun declared himself unable to pass judgment upon them, and allowed Randolph to proceed.

This flabbiness in Calhoun's conduct of his office led to vigorous and protracted debate,<sup>1</sup> which resulted in amending the rules so as to recognize in the Chair a power, of his own instance, to call a Senator to order — a power which no previous Vice-President had denied that he possessed, and one which several of them had exercised vigorously. But this new rule for the first time in the history of the Senate permitted an appeal from the Chair's decision on a question of order. In effect, it distinctly tended to detract from the dignity and power of the Chair — a result which was obviously satisfactory to Calhoun.

From 1828, when the rules were thus changed, down to 1850, it was the general practice for the President of the Senate not to interfere unless a question of order was first raised by a Senator. At times the proprieties of debate were grossly violated.<sup>2</sup> Doctor Shoup declares that it would be hard to crowd more unparliamentary expressions into one session than were used in the debate of April 20, 1848. By one Southern Senator, Hale was threatened with lynching if he should enter his state, and by Calhoun he was likened to a 'maniac from bedlam'; Jefferson Davis threatened civil war, and declared that it might as well begin in the Senate Chamber.<sup>3</sup> Two years later, Vice-President Fillmore addressed the Senate at length, recounting the changes in the Senate's rules and practice as to the

<sup>1</sup> *Cong. Debates*, 278-341, Feb. 11-15, 1828.

In explaining his non-action, Calhoun declared that neither in the Constitution nor in the Senate rules did there exist a phrase which conferred the power to call a Senator to order for words used in debate. It was inconceivable that the Constitution would have vested in the Vice-President so despotic a power. 'Who is a Senator, that the right of uttering his sentiments within these walls should be placed under the will of an officer connected, in a certain measure, with the executive branch of the government? He is the representative of a state in its sovereign capacity, and, in the larger states, is the organ of the will of more than a million of constituents. It would then be absurd to suppose that the right of determining what he should say, and in what manner, should be placed by the Constitution in the power of an officer wholly irresponsible to this body.'

He declared that he would not 'for ten thousand worlds look like a usurper.' B. P. Poore, *Reminiscences*, I, 70; Hatch, *op. cit.*, 76.

<sup>2</sup> *Cong. Debates*, 485, Feb. 6, 1834.

<sup>3</sup> *Cong. Globe*, Appendix, 500-10.

maintenance of order. He expressed the view that not only did the Constitution and the rules grant to the Chair as well as to a Senator the power to call a Senator to order, but that, 'though the authority may be the same, yet that the duty may be more imperative upon the Chair than upon a Senator.' He announced: 'If the painful necessity shall hereafter arise, I shall feel bound to discharge my duty accordingly.'<sup>1</sup> The Senate listened with respect, and it was unanimously voted that the Vice-President's remarks be entered on the *Journal*.<sup>2</sup> A fortnight later Fillmore's irresolution and the emptiness of his words were made clear. Foote of Mississippi had persisted in most offensive personal abuse of Benton until the latter, after great forbearance, replied in language equally disorderly and abusive. Through all this Fillmore sat silent. When Foote resumed his abuse and Benton rushed threateningly toward him, Foote drew a pistol. Only the intervention of other Senators prevented bloodshed. Yet the committee which deliberated for three months on this disgraceful performance did not venture to insist that for the future the President of the Senate should enforce the rules, but tamely recommended that Senators should rely upon the Senate for their defense against insult and injury, and that they should not wear arms in the Senate Chamber!<sup>3</sup>

In 1856, with the approval of leaders of both parties, the rules were amended to provide that if a Senator transgress the rules of the Senate 'in speaking, or *otherwise*, the Presiding Officer shall, or any Senator may' call him to order.<sup>4</sup> To this in the general revision of 1877 was added the further provision:

And when a Senator shall be called to order he shall sit down, and not proceed without leave of the Senate, which, if granted, shall be upon

<sup>1</sup> April 3, 1850, *Senate Journal*, 248 ff.

<sup>2</sup> April 17, 1850, *Cong. Globe*, 762-64.

<sup>3</sup> July 30, 1850. This was not the first nor the last appearance of pistols in the Senate Chamber. In 1835 the 'turbulent and bullying Poindexter . . . baited the Vice-President at times and plotted to involve him in a personal fracas within the precincts of the Capitol, and thus to expose him to personal ignominy and ridicule. Van Buren thwarted the scheme by discreet measures, one of which was arming himself with a brace of pistols which he wore even in the Chair.' (Van Buren, *Autobiography*, 754-62.) In 1863, until another Senator raised the question of order, Vice-President Hamlin allowed Saulsbury to continue in a drunken and outrageous tirade against President Lincoln. When called to order by the Vice-President, Saulsbury turned his insults upon him and Senators, and threatened the Sergeant-at-Arms with a pistol, when taken into custody. He saved himself from expulsion by an open apology to the Senate. Jan. 27 and 29, 1863, *Cong. Globe*, pp. 549-52, 584.

<sup>4</sup> *Senate Journal* (June 26, 1856), 396.



motion that he be allowed to proceed in order, which motion shall be determined without debate.<sup>1</sup>

So the rule has stood for more than half a century. But Vice-Presidents are hesitant to perform what Fillmore called 'this delicate and ungracious duty.'

### *Maintaining Order in the Galleries*

From time to time it has been necessary to clear a portion or the whole of the galleries because of turbulent demonstrations. On one occasion a disturber was arrested and brought from the gallery to the bar of the Senate, but was then promptly discharged on motion of Benton, whom he had been assailing.<sup>2</sup> In 1913, when Marshall declared that he had been unable to find any Senate rule forbidding 'manifestations in the galleries of approbation or disapprobation,' Bacon earnestly protested:

It is not necessary, Mr. President, that there should be a rule in words to that effect. It is a fundamental, inherent rule in every parliamentary body that it shall protect itself against disorder, and that its proceedings shall not be interfered with or influenced by any action or by any word or by any sound from those who are not members of the body.<sup>3</sup>

A few months later an amendment to the rules was adopted, making it the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator,

whenever confusion arises in the Chamber or in the galleries, or demonstrations of approval or disapproval are indulged in by occupants of the galleries.<sup>4</sup>

This rule is not to the liking of Senators — and they are many — who talk to the gallery. During the debate on the League of Nations, when the Chair was about to clear the galleries, he desisted at the request of the Senator whose speech had been applauded.<sup>5</sup>

### RECOGNITION

The Senate rules require that a Senator desiring to speak shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him.<sup>6</sup>

<sup>1</sup> Rule 36, of Jan. 17, 1877; now Rule XIX, cl. 4 (1935).

<sup>2</sup> *Senate Journal*, 124, Jan. 16, 1837.

<sup>3</sup> Sept. 8, 1913, *Cong. Rec.*, 4491-92.

<sup>4</sup> Rule XIX, cl. 6. Jan. 14, 1914.

<sup>5</sup> *Cong. Rec.*, 4520-24.

<sup>6</sup> Rule XIX, cl. 1.

Jefferson declared that 'in the Senate of the United States the President's decision is without appeal.'<sup>1</sup> Senate majority and minority leaders have united in sustaining that position.<sup>2</sup> Since the Vice-President — who may be of the party in minority in the Senate — may at any time be in the Chair, the power of recognition in the hands of the Senate's presiding officer has never been developed into a powerful party weapon as it has been in the hands of certain Speakers of the House. Charges of personal or partisan favoritism in granting recognition have been comparatively rare. The Vice-President yields to the peculiar restraints that surround his office. During the hard-fought struggle over the repeal of the silver-purchase clause of the Sherman Act, in a formal interview President *pro tempore* Isham G. Harris was asked what would happen if the Vice-President should refuse further to recognize those who sought to continue the filibuster, and should arbitrarily put to vote the question of repealing the law. 'He would never live to do it!' was his prompt reply.<sup>3</sup> In recent years La Follette repeatedly charged that the habit had become almost universal, when unanimous-consent agreements had been entered into, for the occupant of the Chair to make a list of favored Senators to be recognized, parceling out the time as he pleased, ignoring the Senate rule requiring that recognition be given to the Senator who first rises and addresses the Chair.<sup>4</sup>

#### INTERPRETING THE CONSTITUTION

Rarely has a Vice-President, in the Chair, taken it upon himself to question the constitutionality of a pending measure. Calhoun once 'doubted whether it was in order to originate in the Senate a bill containing' such provisions affecting tariff rates as appeared in the bill under consideration. On his own initiative he submitted the question of order, but upon motion of a Senator both the point of order and the bill were laid upon the table.<sup>5</sup> At another time Calhoun,

<sup>1</sup> Jefferson's *Manual*, sec. XVII.

<sup>2</sup> For example, Cummins and Robinson, Sept. 21, 1922, *Cong. Rec.*, 13079.

<sup>3</sup> David S. Barry, *op. cit.*, 189. Barry was one of the two men who interviewed Harris, and insists that his words and meaning were accurately reported, despite the Senator's repudiation of the remark and interpretation attributed to him. (*Cong. Rec.*, 2756, Oct. 21, 1893.) The same writer tells of Roosevelt's perplexity, when addressed at the same moment by several Senators. He looked about the Chamber till his eye rested upon the benign face of the senior Senator from Massachusetts. Pointing to him, he shouted, 'Mr. Hoar,' in that unconventional fashion 'recognizing' a Senator who had not addressed the Chair at all.

<sup>4</sup> Feb. 9, 1924, *Cong. Rec.*, 2185; see also March 4, 1917, *ibid.*, 5012.

<sup>5</sup> *Senate Journal*, 156, Feb. 25, 1830.

in doubt as to whether a particular joint resolution required the President's approval, put that question before the Senate, and it was decided in the negative.<sup>1</sup> In 1917 Marshall insisted that in dealing with a bill which had been vetoed the Constitution's words, 'shall proceed,' meant a continuous proceeding until the matter of the veto was disposed of; but he was overruled, and action on the veto was postponed.<sup>2</sup>

#### ADMINISTERING THE SENATE'S RULES

Questions of order as to breaches of the Senate's rules of procedure are usually raised from the floor, and, 'unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate.' In the hundred years since the rules first permitted appeals from the Chair's decisions, reversals have been surprisingly few, when one considers the inexperience of many a Vice-President and the Senate's jealousy of a presiding officer not of its own choosing. Colfax declared that in his four years of service he had never been reversed,<sup>3</sup> and the same remarkable record was made by Dawes, despite the temporary antagonism aroused among the Senators by his devoting his inaugural address to a furious attack upon the Senate rules. The reasons for such infrequency of reversal are, of course, that a tactful Vice-President bases most of his rulings upon precedents, particularly upon decisions which the Senate itself has made, and that, if the question raised is new and of importance he at once voluntarily submits it to the Senate for determination.

It is very unusual for a Vice-President to raise a question of order upon his own initiative. When Aaron Burr once interrupted the regular order of business to urge immediate decision upon an apparent contradiction in the Senate rules, the Senate put the matter aside, after some members had chidden him for discussing the propriety or impropriety of rules laid down by the Senate.<sup>4</sup> But Marshall once

<sup>1</sup> Dec. 8, 1826. Several of these illustrations are taken from E. L. Shoup's monograph, *The Vice-Presidency*, Widener Library, Harvard University.

<sup>2</sup> *Cong. Rec.*, 2467, Feb. 2, 1917.

<sup>3</sup> Hollister, *Schuyler Colfax*, 353-54.

<sup>4</sup> Feb. 23, 1803, *Annals of Congress*, 105-06. Several members showed resentment. Nicholas: 'The officer, whoever he may be, that is appointed to expound the rules of that House [the Senate], ought not, he has not the right to go into a discussion of the propriety or impropriety of any rules laid down by the Senate — it was not orderly to do so.' Even a Senator, in the Chair, may be taken to task for commenting upon action permitted under the Senate rules. Feb. 8, 1915, Gallinger, rising to a point of order: 'Does the Chair think it is in the competence of the Chair to talk about the pro-



made an important ruling, and frankly announced that it was contrary to previous rulings of the Senate. Most decisions of a constructive character in regard to procedure have naturally been made by the Senate itself.<sup>1</sup>

### *Expediting Business*

The Vice-President has no such control over dilatory motions as has been exercised by the Speaker, although under the Cloture Rule of 1917 he may decide, subject to appeal to the Senate, whether or not a motion is dilatory or an amendment germane to the main question.<sup>2</sup> Obstruction through the breaking of quorum has presented many puzzling situations, in which the Senators have shown great reluctance to have decisions made by an 'outsider.' Said Senator Bailey:

We do not choose our own Presiding Officer. . . . We have no power ourselves to depose him. Remembering that he is put over us without our consent, and often over our protest, the Senate cannot be too resolutely insistent that he shall merely execute the rules, not as he may think they ought to be read and administered, but as they have been read and as they have been understood by this body from time out of mind.<sup>3</sup>

Nevertheless, persistence on the part of the Vice-Presidents, backed by public opinion during some notable filibusters, has secured the reversal of some obstructionist precedents, and in recent years business has been frequently expedited by the counting of a quorum — especially by the including of the names of Senators who have declined to vote because of 'pairs,' and by the ruling that debate — the mere continuance of a long-winded speech — is not 'intervening business,' affording the basis for a Senator's raising the question of the presence of a quorum.<sup>4</sup> Senators are ever ready to protest against assertiveness

cedure of the Senate, as to its nature?' The presiding officer (Ashurst): 'The Chair thinks it is competent for the Chair to give reasons why the Chair should make a certain ruling.'

<sup>1</sup> May 17, 1917, *Cong. Rec.*, 2436-37. E. L. Shoup, *op. cit.*, mentions the following among other examples of important constructive rulings made by the Vice-President:

Hamlin: Less than a quorum may take a recess. (April 8, 1864, *Cong. Globe*, 1690.)

Morton: An original motion being undebatable, an appeal based upon it is likewise undebatable. (Jan. 16, 1891, *Senate Journal*, 80.)

Fairbanks: A presiding officer may count Senators present but not voting to make a quorum. (May 29, 1908, *Cong. Rec.*, 7158, 7159, 7166.)

Marshall: New matter, if included in a conference report, may be ruled out on a point of order. (May 17, 1917, *ibid.*, 2436-37.)

<sup>2</sup> Rule XXII.

<sup>3</sup> Bailey, Dec. 19, 1910, *Cong. Rec.*, 473; Bacon, June 4, 1912, *ibid.*, 7617.

<sup>4</sup> May 29, 1908, *ibid.*, 7259-61.

of authority by the Chair. A Dawes ruling brought the comment:

I do not want this matter to grow cold without a protest. . . . I want to say that the gavel will not be used in the Senate to shut off the rights of the members.<sup>1</sup>

But members of the irate Senator's own party declared that there was not the slightest occasion for denouncing the Chair for an abuse of the gavel in the ruling in question. It has been said that in Hobart's day the Vice-President's room was used as the rendezvous where party leaders were brought together to determine party strategy. On one occasion Dawes was credited by the press with having forestalled a filibuster and the blocking of needed legislation by persuading the leaders of rival groups, each determined to force a vote upon its own measure, to confer with him to reach an agreement on giving certain measures the right of way. There was no trading of votes, but merely an agreement upon a schedule which would make possible a fair allotment of time for consideration, and a decision upon each measure.<sup>2</sup>

#### CHECKING IRRELEVANT DEBATE

Early Presidents of the Senate assumed some responsibility for the members' procedure in debate. John Adams 'took on him to school members from the Chair.'<sup>3</sup> Burr 'preserves good order, silence & decorum in debate — he confines the speaker to the point.'<sup>4</sup> Their successors hesitated to call a Senator to order for irrelevancy. In the debate on Foote's resolution Hayne was allowed to address the Senate for days without once alluding to the project which occasioned the debate. July 5, 1848, Clayton, proceeding to address the Senate, was called to order by Niles, on the ground that the topics he was introducing in debate were irrelevant to the subject-matter of the resolu-

<sup>1</sup> Feb. 25, 1926, *Cong. Rec.*; J. A. Reed.

<sup>2</sup> 'The business of the presiding officer is to expedite business. If he can aid by informal conference outside of the Chamber, he considers he is well within his rights. It is understood that he did not discuss the merits of legislation or attempt to influence votes, but simply to get the farm group to agree to let the banking measure come to a vote, in return for which support would be given to permit the farm bill to be voted on. Thus is a filibuster prevented and two measures taken out of the legislative jam which always develops in a short session which expires automatically on March 4.' (David Lawrence, in the press dispatches on Feb. 3, 1927.)

Although this mediation by Dawes helped to expedite business, it is said to have placed the President in a most unwelcome dilemma by bringing these two bills to his hand at the same time. He signed the Banking Bill, 'but was compelled by his judgment, conscience, and the political situation to veto the McNary-Haugen Bill, a course which could not fail to injure him in the West.' (Hatch and Shoup, *op. cit.*, 41.)

<sup>3</sup> Maclay, *Journal*, 30, May 11, 1789.

<sup>4</sup> William Plumer, *Memorandum*, 75.

tion. The Vice-President (Dallas) decided that the debate was irrelevant and out of order.<sup>1</sup> Mangum moved that leave be given to the Senator from Delaware to proceed. In the debate that followed, repeated reference was made to the precedent of Hayne's long-drawn-out irrelevancy. Niles protested: 'We are now called on to decide by a vote of yeas and nays that a Senator may proceed out of order.' He declared that important business had been thrust out 'by this reckless and indecent debate, which was suited only to the stump.' But the Senate, nevertheless, gave Clayton leave to proceed.<sup>2</sup>

In 1872, when the point of order was raised that Sumner's remarks were irrelevant, Vice-President Colfax ruled:

The Chair decides that Senators have always been so jealous of their own rights when presided over by a person not elected by them but elected by the people to preside over them, that they have never yet, within his knowledge, consented to make a rule or usage which allowed their Presiding Officer to rule out their language as not relevant to the question that was pending. Senators must judge for themselves as to the pertinency of their remarks to the case in hand. . . . The Chair decides that by the usage of the Senate he cannot restrain a Senator in remarks which are, in the opinion of the Senator himself, pertinent to the issue before the Senate.

At the suggestion of a Senator: 'Why not take the sense of the Senate upon it?' he added:

The Chair will state to the Senator from Ohio (Sherman) that it will relieve him very much from embarrassment if he will take the sense of the Senate on this subject.

Accordingly Sherman appealed from the decision. In putting the question, the Vice-President announced:

Then the Chair will understand, if the Senate reverses the decision, that debate is to be confined strictly to the motion before the body.

By a vote of 28 to 18, the Chair was sustained.<sup>3</sup> From the day of that unfortunate decision, for more than sixty years the practice has been that a Senator cannot be taken from the floor for irrelevancy in debate.

<sup>1</sup> *Senate Journal*, 440-41, July 5, 1848. Note Webster's comment on Hayne's speech, p. 424, n. 4.

<sup>2</sup> By a vote of 26 to 22. Aug. 12, 1848, Foote was called to order by Niles for irrelevancy. Yulee (in the Chair) ruled that he was not out of order, but on appeal this decision was reversed, 2 to 27. Two days later, Webster made a similar point of order against Turney, but the President *pro tempore* decided that he was in order. Gilfry, *Senate Precedents*, I, 401.

<sup>3</sup> Feb. 29, 1872, *Cong. Globe*. For further discussion of relevancy in debate, and for the House rule on that subject, see pp. 423 ff.



## THE VICE-PRESIDENT'S RELATION TO THE ADMINISTRATION

I think the Vice-President can be a most effective agency for keeping the executive office in touch with the legislative branch of the Government.<sup>1</sup>

Over a question which the members of the Federal Convention debated as a matter of theory, opinion is still much divided as a matter of practice and expediency. For reasons which seemed to them good, the framers of the Constitution made the Vice-President of the United States President of the Senate. Holding this office, what should be his relation to the President of the United States and to the National Administration?

In the Convention definite consideration was given to a proposal that the President of the Senate should be included in a council of advisers to the President.<sup>2</sup> From time to time suggestion has been made for increasing the administrative scope of the Vice-President's position with the view to making him of greater service, and in the belief that, if the office were made more powerful, stronger men would be nominated and would consent to serve.<sup>3</sup> Since none of the proposals has ripened into legislation, whatever executive activity has been exercised by the Vice-President has depended upon the attitude and the initiative of the individual President. In the Convention, Gerry had strongly opposed making the Vice-President the President of the Senate. He declared:

We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President and the Vice-President makes it absolutely improper.<sup>4</sup>

To this, Gouverneur Morris at once rejoined:

The Vice-President will be the first heir apparent that ever loved his father.<sup>5</sup>

President Washington had a high regard for John Adams's judgment, and submitted several questions to him, requesting his formal advice. Upon leaving the seat of government for an absence of several weeks, the President wrote to the three heads of departments

<sup>1</sup> President-elect Harding. Quoted in *New York Times*, Dec. 17, 1920, 1 : 5. For discussion of proposal, made at various times, to bring the executive and legislative branches into closer touch by giving Cabinet members the right to sit and speak in either branch of Congress, see S. Rept. 837, 3d sess., 46th Cong., Feb. 4, 1881.

<sup>2</sup> Madison, *Debates*, 448.

<sup>3</sup> H. B. Learned, 'Some Aspects of the Vice-Presidency,' *Proceedings of the American Political Science Association* (1912), 173.

<sup>4</sup> Madison, *Debates*, 527.

<sup>5</sup> *Ibid.*, 527.

suggesting that, if occasion should arise for a conference before his return, it was his wish that the Vice-President be consulted.<sup>1</sup> In accordance with this suggestion, at a 'Cabinet' meeting held April 11, 1791, while the President was still in the South, Vice-President Adams was in attendance, and took active part in discussion, though the Secretary of State presided.<sup>2</sup> For nearly one hundred and forty years thereafter no instance has been discovered of a Vice-President attending a Cabinet meeting by formal invitation.

It is said that Adams felt offended at not being summoned regularly to Cabinet meetings, and regarded his exclusion as evidencing a want of personal respect for himself, but when he became President he did not invite Vice-President Jefferson to sit in the Cabinet.<sup>3</sup> Despite the fact that their political views were far apart, before his inauguration Adams is said to have expressed satisfaction at the prospect of administering the government in concurrence with the Vice-President. Upon this remark Jefferson commented:

If by that he meant the executive cabinet, both duty and inclination will shut that door to me.<sup>4</sup>

To a friend who early broached to the Vice-President the possibility of his taking part in the Administration's conferences, Jefferson bluntly replied:

I consider my office as Constitutionally confined to legislative functions and could not take any part whatever in executive consultations, even were it proposed.<sup>5</sup>

Half a century later the question of bringing the Vice-President into the Cabinet aroused new interest. It seems at first to have been General Zachary Taylor's intention — following, as he supposed, Washington's example — to invite the Vice-President to sit regularly at the Cabinet table. He conferred with Fillmore and assigned to him the filling of certain New York appointments, much to the perturbation of Whigs of the opposite faction. But, under Crittenden's advice, Taylor soon changed his mind. He wrote Fillmore expressing

<sup>1</sup> Washington, *Diary from 1789 to 1791* (edited by B. J. Lossing), 162; *Writings*, XII, 34, 35; Jefferson, *Writings*, V, 320 ff.

<sup>2</sup> The account of this unique attendance of a Vice-President at a 'Cabinet' meeting is given in H. B. Learned's *The President's Cabinet*, 123-24.

<sup>3</sup> Miss Clara H. Kerr, *Origin and Development of the United States Senate*, 22-23.

<sup>4</sup> Jan. 22, 1797, *Writings* (Library edition), 367-68.

<sup>5</sup> Letter to Gerry, May 13, 1797, *Writings* (edited by P. L. Ford), VII, 120. In this same letter Jefferson wrote: 'The second office of this government is honorable & easy, the first is but a splendid misery.'

regret that he could not have the benefit of his presence and advice in the Cabinet, but adding that he should rely upon his experience and seek his advice upon all important questions. Five days after Taylor's inauguration, Seward wrote to Weed:

The idea of the V[ice] P[resident] being a member of the Cabinet has expired noiselessly.<sup>1</sup>

Five years before he himself became the holder of 'that singular office,' Theodore Roosevelt put forward some suggestions for radically modifying the Vice-President's position in the Government:

It would be very well if he were given a seat in the Cabinet. It might be well if in addition to his vote in the Senate in the event of tie he should be given a vote, on ordinary occasions, and perchance on occasions a voice in debate.<sup>2</sup>

In the very first issue of *The Commoner*, William Jennings Bryan advocated the placing of the Vice-President in the Cabinet;<sup>3</sup> and during the campaign of 1908, he announced his intention, if elected President, to admit his running mate, John W. Kern, to the Cabinet.<sup>4</sup>

In 1918 President Wilson, like President Washington in 1791, faced the prospect of a long-continued absence from the seat of Government, and made provision therefor. Six days after his sailing for France, December 10, a meeting of the Cabinet was held at which Vice-President Marshall, on assuming the Chair, read a statement in which he said:

I am here and am acting in obedience to a request preferred by the President upon the eve of his departure and also at your request. But I am here informally and impersonally. I am not undertaking to exercise any official duty or function. I shall preside in an unofficial way over your meetings out of deference to your desires and those of the President.<sup>5</sup>

<sup>1</sup> This episode in Cabinet history is set forth by H. B. Learned, 'Some Aspects of the Vice-Presidency; *Proceedings of the American Political Science Association* (1912), 174-75, and more recently and with greater detail by C. O. Paullin, 'The Vice-President and the Cabinet,' *American Historical Review*, XXIX, 497, 498. Both articles have been of service to the present writer. For Seward's letter, see F. W. Seward, *Seward at Washington*, II, 107; see also Weed's *Autobiography*, 586-87, and C. N. Feamster, *Calendar of Papers of John J. Crittenden*, 147-49.

<sup>2</sup> *Review of Reviews*, Sept., 1896, XIV, 289 ff. At the time he was President of the Police Board of New York City.

<sup>3</sup> Jan. 23, 1901.

<sup>4</sup> July 15. Learned, *op. cit.*, 174, cites a disapproving editorial from the *New York Sun*, July 19, 1908.

<sup>5</sup> Cited by Dr. Paullin, *op. cit.*, 499, from *New York Times* (Dec. 11, 1918), 14. A member of the Cabinet recorded, Nov. 26, 1918: 'He [the President] asked us to con-



This is the first Cabinet meeting at which a Vice-President is known to have presided, and he continued so to do during the two months of President Wilson's first visit to Paris. By the President's special invitation, also, he was present at the meeting February 25, 1919, at which the President 'revealed to his Cabinet his labors, and expressed his purposes, his difficulties and his hopes.'<sup>1</sup>

The announcement by President-elect Harding of his intention to 'create the office of Assistant President' (as he is said to have phrased it), by inviting the incoming Vice-President to take a seat with the Cabinet, aroused much discussion and not a little opposition. The President's invitation was accepted with appreciation, and Mr. Coolidge thus became the first Vice-President to take his place regularly side by side with the members of the Cabinet.<sup>2</sup> Although Mr. Harding's most important public service before his election to the Presidency had been as a member of the United States Senate, and although to an unprecedented extent his nomination had been furthered and effected by Senators, this effort of his, avowedly intended to keep the executive officers in touch with the legislative branch of the Government, brought not a little adverse criticism from his former colleagues. They queried whether, if difference should develop between the President and the Senate as to legislative matters, the Vice-President might not consider it his duty to exercise his parliamentary powers in such a manner as to accomplish the will of the President and defeat the judgment of the Senate. In the exercise of the quasi-executive power of the Senate, opponents insisted that such a liaison officer might find himself in a very embarrassing position.<sup>3</sup> For example, behind closed doors in the Cabinet he would

tinue Cabinet meetings and inquired if it would be agreeable to us to have the Vice-President preside. We immediately responded that it would be a very acceptable arrangement.' (D. F. Houston, 'Wilson as Peacemaker,' *World's Work* (Aug., 1926), 405.)

<sup>1</sup> These statements are from a letter from Mr. Marshall to the writer, under date of Dec. 3, 1923.

<sup>2</sup> It has been asserted (e.g., in syndicated article by Robert T. Small, of Dec. 17, 1920) that Vice-President Sherman, at President Taft's invitation, became a member of his official family, and that while he 'regarded his constitutional duty of presiding over the Senate as paramount in public importance, he was at liberty at all times not only to attend but to participate in the discussions of the Cabinet as a coequal member of that advisory body.' Letters to the writer from ex-President Taft, from a member of his Cabinet, and from a son of Mr. Sherman all indicate that Mr. Sherman never entered the Cabinet room during a session, except by casual invitation extended when he may have been at the White House on other business.

<sup>3</sup> Shrewd forecasts of the embarrassments which might arise from the Vice-President's attendance upon Cabinet meetings had been made a century before, in two pamphlets by Judge Augustus B. Woodward: *Considerations on the Executive Govern-*

hear discussions of the qualifications of nominees for public office, and later, behind closed doors in the Senate, he might be called upon to give the decisive vote as to their approval or rejection. The instance of President Cleveland's two rejected nominees to the Supreme Bench, Hornblower and Peckham, was cited. Or in Cabinet meeting the Administration's attitude as to some question of foreign policy might be discussed and determined upon, and later that same question might for months be the subject of bitter controversy in the Senate. Would it have added to Vice-President Marshall's comfort, or to the value of his service in presiding over the Senate during the struggle over the ratification of the Treaty of Versailles, if it had been known that he had been sitting in council with the Cabinet in any discussion which the President saw fit there to raise as to that momentous issue?

With the memories of that contest fresh in his mind, Vice-President Marshall commented on the President-elect's announced plan as follows:

The Constitution of the United States intended that the Vice-President should be the presiding officer of the Senate and nothing else. To be a presiding officer it is necessary that the Vice-President shall have the entire confidence of all the Senators. If a Vice-President should attend meetings of the Cabinet, practically as a member, it would tend to arouse suspicion, and Senators of the minority body might not trust him. This would make the path of the Vice-President in the Senate a rough one. If any representatives from the Capitol are to attend Cabinet meetings, the majority leader of the Senate and the majority leader of the House should be the men selected.<sup>1</sup>

To what extent is this precedent set by President Harding likely to be followed? The Cabinet as an advisory council is unknown to the Constitution and to the law. Obviously not by act of Congress will a Vice-President be thrust into a seat at the Cabinet table, and no President will extend such an invitation unless he believes that the intimate association will be personally congenial and will strengthen his Administration. The rise of the political party system and particularly the development of nominating conventions and presidential primaries give little assurance that in a majority of cases

*ment of the United States of America, 1809, and The Presidency of the United States, 1825, both of which are discussed by Learned, The President's Cabinet, especially 142-47. In the second pamphlet, Judge Woodward wrote: 'Perhaps his [the Vice-President's] constitutional function of being prolocutor of the Senate was deemed incompatible with his being a member of the Cabinet. His attendance would frequently be inconvenient, and his possessing a voice in the deliberations of the Senate might render it indelicate.'*

<sup>1</sup> *Boston Herald*, Dec. 4, 1920. See also *Springfield Republican*, March 10, 1921, 8.

the inclusion of the Vice-President in the Cabinet would tend to add to the harmony or strength of the President's official family.

The history of the relation between the Presidents and their possible successors confirms this conclusion. Jackson found in Van Buren a congenial adviser, and Polk kept in touch with Dallas on matters of administration policy.<sup>1</sup> In more recent times McKinley took Hobart into his confidence, and the Vice-President's room at the Capitol became the meeting-place where Senate leaders came together in conference, and many a problem requiring party diplomacy was there worked out.<sup>2</sup> But these are exceptions. Present conditions of nominations tend to bring to the two offices men who are incompatible, since they are usually chosen from different wings of the party and represent diverse attitudes on many public questions. Thus, Stevenson, nominated to conciliate the free-silver Democrats, would not be sought as a Cabinet adviser by Grover Cleveland. The combination of Harrison and Tyler is a classic instance of the incongruity which our nominating machinery may bring into the two positions. Of the possible clash between President and Vice-President a more striking instance could hardly be found than that between Garfield and Arthur, a spoilsman whom President Hayes had removed from the office of Collector of the Port of New York because of his political activities in that post, and who was presently to leave the Capitol to go to Albany and there work for the re-election of Conkling and Platt, despite the fact that nothing could prove more humiliating to President Garfield and damaging to the prestige of his Administration than the success of this campaign to which the Vice-President was devoting himself. Although Roosevelt had advocated the bringing of the Vice-President into the Cabinet, eight years later he extended no such invitation to Vice-President Fairbanks, his antithesis in temperament and political outlook.<sup>3</sup>

<sup>1</sup> Learned, *The President's Cabinet*, 385.

<sup>2</sup> *Ibid.*, 386, cites David Magie, *Life of Garrett Augustus Hobart*, 168-69: 'It may be safely said that no measure of importance was discussed with the Cabinet of which the Vice-President was not cognizant; and that members of the Cabinet, as well as the President, freely took counsel with him. The unusual title given him in some of the papers in recognition of his influence was "Assistant President."'

<sup>3</sup> When Roosevelt's going down in a submarine was criticized on the ground that the President should not thus endanger his life, one newspaper commented: 'At least he should have taken Fairbanks with him.'

Nor did President and Vice-President see eye to eye on major policies in midsummer of 1937, when Vice-President Garner went home to Texas for many weeks of fishing at the time when Majority Leader Robinson was literally working himself to death to secure every possible pledged vote in defense of the President's bill for the reorganization of the Supreme Court — a bill doomed to overwhelming defeat at the hands of his own party.



Yet, despite the obvious fact that national conventions have usually made nomination of the candidate for the Vice-Presidency mainly as a 'harmonizer,' nevertheless he is the President's potential substitute, who may at any moment be called to the most powerful office in the world. After the first shock from the announcement of President Harding's sudden death, the almost universal reaction the country over was that of an immense reassurance founded, not only on what was known as to the new President's character and ability, but also on the knowledge that for two and a half years he had had a part in the Cabinet's consideration of the important issues which had confronted the Administration, and had come to know intimately the personality and habits of thought and action of each of the department heads with whom for the time being he must carry forward the work of the National Government. President Harding's kindliness led him to make the Vice-President 'in the fullest sense a partner in the operation of affairs,' with the result that Calvin Coolidge's 'transition to the Presidency proved the least disrupting of any of the kind in our history.'<sup>1</sup>

Since Vice-President Coolidge is the only one who has sat with the Cabinet and later become President, especial interest attaches to his final judgment of this relationship:

If the Vice-President is a man of discretion and character so that he can be relied upon to act as a subordinate in that position, he should be invited to sit with the Cabinet, although some of the Senators, wishing to be the only advisers of the President, do not look on that proposal with favor. He may not help much in its deliberations, and only on rare occasions would he be a useful contact with Congress (House), although his advice on the sentiment of the Senate is of much value, but he should

<sup>1</sup> Boston *Herald*, editorial, Aug. 4, 1923. Compare with its editorial of Nov. 27, 1924, 'Coolidge and Dawes Right,' strongly approving Coolidge for not following Harding's example.

The Vice-President, who accepts a seat at the Cabinet table and later becomes President must not expect to escape blame for sins of omission or commission charged against the Administration. In the hectic days of the first session of the 68th Congress, when the Democrats were striving to make all possible capital out of the scandals connected with the lease of the naval oil reserves, President Coolidge frequently became the target of attack in the Senate. Senator La Follette called attention to the fact that Vice-President Coolidge was in the Chair at the time when the subject of those leases was first brought to the attention of the Senate by debate over a resolution calling for their investigation. (*Cong. Rec.*, LXVIII, part 1, 2265.) Hiram Johnson's campaign manager issued the statement: 'The decent thing, the only thing for Mr. Calvin Coolidge is to withdraw his name from consideration as a candidate for the Republican nomination for President. He was a member of the Cabinet in which Mr. Fall, Mr. Denby, and Mr. Daugherty sat when the corrupt oil leases were put over on the American people.' (Press dispatches, Jan. 27, 1924.) It is to be observed that both these attacks came from aspirants for the Republican nomination in 1924!

be in the Cabinet because he might become President and ought to be informed on the policies of the Administration. He will not learn all of them. Much went on in the departments under President Harding, as it did under me, of which the Cabinet had no knowledge. But he will hear much and learn how to find out more if it ever becomes necessary. My experience in the Cabinet was of supreme value to me when I became President.<sup>1</sup>

It is to be observed that this is a carefully qualified judgment, starting with a very important 'If.' Before Charles G. Dawes was inaugurated, perhaps to forestall an embarrassing invitation, he had declared his belief that the plan of having the Vice-President sit with the Cabinet was unwise:

The Cabinet and those who sit with it should always do so at the discretion and inclination of the President. Our Constitution so intended it. The relation is confidential and the selection of a confidant belongs to him who would be injured by the abuse of confidence, however unintentional. No precedent should be established which creates a different and arbitrary method of selection. Should I sit in the Cabinet meetings, the precedent might prove injurious to the country. With it fixed, some future President might face the embarrassing alternative of inviting one whom he regarded as unsuitable into his private conferences, or affronting him in the public eye by denying him what had been generally considered his right.<sup>2</sup>

By the framers of the Constitution the office of Vice-President was 'put, so to speak, half-way between the White House and the Capitol, where it has ever remained.'<sup>3</sup> In consequence, there attaches to the Vice-Presidency a prestige derived from two entirely different sources. There is little opportunity for the Vice-President to share in the executive work of the Administration; but there devolves upon him heavy responsibilities in matters formal and cere-

<sup>1</sup> *Autobiography of Calvin Coolidge*, 163-64.

<sup>2</sup> Quoted by Hatch and Shoup, *op. cit.*, 45, from an interview with Mr. Dawes after his election as Vice-President. The next two Vice-Presidents, Curtis and Garner, both received and accepted invitations to sit with the Cabinet. Is the precedent already becoming 'injuriously fixed'?

Commenting on Cabinet procedure, Curtis is quoted as saying: 'Though the President exchanges opinions with members, in the presence of all, no member would presume to take part in what did not apply to his department unless explicitly invited to do so. The Vice-President sits in the meetings as a guest of the Cabinet; he takes no part in any discussions; he is merely an observer.'

<sup>3</sup> When Charles Curtis, a widower, became Vice-President, he announced that his sister, Mrs. Edwin Gann, was to be his 'official hostess,' thus launching a problem which for months agitated social Washington. At formal dinners and other functions, should precedence be given to Mrs. Dolly Gann, or to Mrs. Alice (Roosevelt) Longworth, the wife of the Speaker? This controversy is recounted at great length in the Hatch and Shoup *History of the Vice-Presidency*.

monial. By fixed tradition — which Calvin Coolidge tried to break — he has become the official ‘diner-out’ for the Administration. This raises questions of precedence which have caused perturbation even to the entire diplomatic corps.

#### THE ANOMALOUS OFFICE OF VICE-PRESIDENT OF THE UNITED STATES

‘The Vice-President’s office is ill-conceived . . . He is *aut nullus aut Caesar*.’<sup>1</sup> So wrote James Bryce in 1887. Nearly a century earlier, John Adams, the first Vice-President, had characterized his office in terms no less pungent and positive:

My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived.<sup>2</sup>

Yet Vice-Presidents of strong personality and aptitudes for leadership have exercised not a little influence upon the Senate. Several of them have not been able to restrain the politician’s impulse. Thus John Adams labored assiduously to bring Senators to his views. Upon one legislative measure Maclay writes:

Our Vice-President was very busy indeed, running to everyone. . . . The truth . . . was that everybody believed that John Adams was the great converter.<sup>3</sup>

Calhoun shifted from the Vice-Presidency to the Senate, but plied the same arts of manipulation in both positions. Jefferson has left a more enduring impress. His *Manual of Parliamentary Practice* is in every Senator’s desk, and not a session passes without many an appeal to it as authority. In the months preceding Theodore Roosevelt’s inauguration as Vice-President there were signs of perturbation in the Senate as to how adaptable a President of the Senate he would prove to be. It is a matter of curious speculation what the effect would have been upon the Vice-President’s chair in the Senate if for four years it had been occupied by a man of his strenuousness.<sup>4</sup> (His

<sup>1</sup> *The American Commonwealth* (ed. 1889), I, 293.

<sup>2</sup> Letter to his wife, Dec. 19, 1793. *Life and Writings*, I, 460. That the Vice-Presidency is a superfluous office, so far as the Senate is concerned, is sufficiently proved by the fact that, during thirty-five years of our history, the office of Vice-President has been vacant. During more than a fourth of the Senate’s existence, its Chair has been occupied by a presiding officer of its members’ own choosing, and no one has mourned the absence of the Vice-President from the Senate Chamber.

<sup>3</sup> *Journal*, 115.

<sup>4</sup> He himself was curious as to how he should occupy his time and find an outlet for his abounding energy. Coming to Washington, he called upon Mr. Justice White,



actual service was for only six days — March 4–9, 1901.) But four years of Dawes left that chair intact!

Nearly a century and a half of experience and observation of the Vice-Presidency in its relation to the Senate have not strengthened its position in the regard of the people. Again and again resolutions have been introduced for the abolition of the office by amendment of the Constitution. Yet if imitation be the most sincere praise, even the Vice-Presidency has received its meed of approval.

In more than thirty states of the Union today the second state officer, commonly known as the Lieutenant-Governor, chosen by popular vote, is made the chairman of the Senate and given only a casting vote. It will be recalled that the southern statesmen of 1861, familiar with the Federal Constitution as it had existed for a period of over seventy years, adopted the features of the vice-presidency exactly as they found them.<sup>1</sup>

Discussing 'that singular office' from the viewpoint of a theorist and historian, before he himself became President, Woodrow Wilson wrote:

But Vice-Presidents of the United States have, almost without exception, whatever their natural vigor or instinct of initiative, felt that their relation to the Senate was purely formal. . . . His position seems to demand that he should take no part in party tactics and should hold carefully aloof from all parliamentary struggles for party advantage. Its very dignity seems to rob it of vitality in respect to the only duties assigned to it by the Constitution.<sup>2</sup>

### THE VICE-PRESIDENT'S VOTE IN THE SENATE

---

The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. (*Constitution*, art. 1, sec. 3, par. 4.)

and said that he expected to have some time on his hands, as the duties of his office would not be onerous. He asked Mr. Justice White if it would be *infra dig.* for him to attend law lectures in Washington with a view to being admitted to the bar. After some reflection, the future Chief Justice told the future President that such attendance would, in his opinion, hardly comport with his high office. C. G. Washburn, *Theodore Roosevelt: The Logic of His Career*, 39.

<sup>1</sup> H. Barrett Learned, 'Some Aspects of the Vice-Presidency,' *Proceedings of the American Political Science Association* (1912), 164.

<sup>2</sup> *Constitutional Government in the United States* (1911), 131.

This provision for the casting vote aroused little opposition in the Convention. In contemporary discussion it was noted as a fortunate provision which gave the decisive vote to a man who, like the President, was the representative of the entire people and who might thus be expected to act with greater impartiality than a Senator from a single state. In some of the ratifying conventions, the casting vote was criticized as giving legislative power to the Executive.

From the day of John Adams's inauguration as Vice-President to March 4, 1915, Vice-Presidents used the casting vote less than two hundred times. The distribution of these votes was as follows:

#### VICE-PRESIDENTS' CASTING VOTES <sup>1</sup>

I. Executive Functions:	
1. Treaties	3
2. Nominations	13
II. Legislative Functions:	
1. Election of Officers and Questions of Organization	7
2. Procedure	39
3. Bills and Resolutions:	
a. General Public	91
b. Local	5
c. Private	21
Total	179

In a great majority of cases ties in the Senate have come unexpectedly and the use of the casting vote has been without special interest or significance except that it served to 'quicken legislation,' as it was intended to do.

#### MUST THE VICE-PRESIDENT'S VOTE BE RECORDED IN ALL CASES OF A TIE?

In the Senate's history the infrequency of 'casting votes' has been attributed to the application of the general parliamentary rule that when the votes for and against a motion are equal, the negative prevails.<sup>2</sup> It has generally been held, therefore, that the Vice-President

<sup>1</sup> This tabulation has been slightly rearranged from that made by H. Barrett Learned in his study of 'Casting Votes of the Vice-Presidents, 1789 to 1915' (*American Historical Review*, XX, 571-76), upon which the writer has drawn heavily for the treatment of this topic. See, also, Dr. Learned's 'Some Aspects of the Vice-Presidency' (*Proceedings of the American Political Science Association*, IX, especially 170-71.)

<sup>2</sup> Jefferson, however, after citing this general principle, added: 'But in the Senate of the United States the Vice-President decides when the House is divided.' *Manual*, sec. 41.

need only use his casting vote to carry a tied motion which he approves, since to record his vote against a tied motion would merely 'slay the slain.'

Apparently the first instance of a motion upon which the Senators were equally divided was that of July 16, 1789, during the debate upon the second reading of the bill for the establishment of the Department of Foreign Affairs. Maclay narrates the episode thus:

After all the arguments were ended and the question taken, the Senate was ten to ten, and the Vice-President with joy cried out, 'It is not a vote,' without giving himself time to declare the division of the House and give his vote in order.<sup>1</sup>

The Senate *Journal* makes no mention of this action, taken while the Senate was considering the measure as in Committee of the Whole. Maclay's disapproval is obvious, but in his eyes nothing that Adams did was right. Was it because of the Vice-President's precipitancy, or from a wish to force him to go upon record, that two days later, before opening the debate upon the third reading of this same bill, the Senate passed an order that 'in taking the yeas and nays, when the Vice-President is called upon to vote, the Secretary shall propose to him the question'?<sup>2</sup> On that day, at the end of the 'evenly divided' yeas and nays, upon the same motion that had been proposed at the second reading, the Secretary recorded: 'The Vice-President Nay. So it passed in the negative.'

Despite this precedent, there seems to have been general acquiescence in the view that in the numerous cases where Vice-Presidents upon ties have voted in the negative, as a matter of fact their votes were not necessary to defeat the motions.<sup>3</sup> Their motives may well

<sup>1</sup> *Journal*, 116.

<sup>2</sup> *Ibid.*, 65, July 18, 1789.

<sup>3</sup> H. H. Gilfry, *Senate Precedents*, I, 564. Robert Luce, *Legislative Procedure*, 454, comments: 'No harm has been apparent from this chance to get himself put on record, but on the other hand there has been no decisive benefit, and it might have been better had even this opportunity for useless partisanship been avoided by a more careful wording of the constitutional provision.'

This question of the Vice-President's negative vote in case of a tie figured in the proceedings of May 8, 1928. In a formula frequently used (Gilfry, *Senate Precedents*, I, 625-28) Vice-President Dawes announced the result of a roll-call thus: 'The yeas are 40 and the nays are 40. The amendment is not agreed to.' Other business was transacted; two other amendments were agreed to, and a third was under debate, when Reed (Penn.) rose to a parliamentary inquiry, viz., 'How the Vice-President is recorded as having voted' in that last roll-call vote. He insisted that 'under the Constitution [*sic*], it is the duty of the Clerk to call the name of the Vice-President when the Senators are equally divided.' At the direction of the Vice-President the Clerk then called: 'The Vice-President'; but before response was made, Borah intervened, declaring his belief that the amendment in question had been 'lost by reason of the tie vote,' and his failure to understand 'what effect the Vice-President's vote will have.' Walsh



have been a desire not to appear to be avoiding the issue by remaining silent, or a wish, for reasons of personal or of partisan advantage, to put themselves plainly on record.

#### VOTES RELATING TO EXECUTIVE FUNCTIONS

As to treaties, there is no possibility for the exercise of this power in the crucial act of consenting to ratification, since the Constitution's requirement of a two-thirds vote prevents the Senators' being 'equally divided' on that issue.<sup>1</sup> The three votes here tabulated as relating to treaties were all cast upon the same day, March 25, 1840. By them, Vice-President R. M. Johnson promoted the proclamation of a treaty which the Senate had ratified two years earlier.<sup>2</sup>

Sixty years or more have passed since the Vice-President has used the casting vote in connection with nominations. For the most part such votes have been cast in loyal support of nominations made by the President. But Vice-President Calhoun repeatedly used the casting vote to vent his spite against Jackson. Van Buren was

(Mont.) agreed with Reed that, in case of a tie, it was not only the Vice-President's right but his duty to vote. This encouraged Reed to the further startling statement that 'the Constitution [*sic*. Senate Rule XII] compels all of us to vote, unless we are excused,' and he then made the point of order that 'the roll-call is invalid, unless the names of all those entitled to vote shall be called.' It would be interesting to know how many scores of roll-calls in Senate history would have been invalidated if such a point of order had been raised and sustained. 'Compelling' Senators to vote has proved a farce, for in repeated instances with impunity they have declined to vote, after the Senate has refused to excuse them (p. 365). Hence the absurdity of the contention that a roll-call is invalid on the ground that the name of the Vice-President was not called, when it is clear (1) that he could have insisted that his name be called; (2) that he could have declared his vote without his name's having been called; (3) that his negative vote could not have changed the result; and (4) that under no circumstances could the Senate compel its 'Constitutional President' to record his vote.

'I am perfectly clear the Senate cannot compel the Vice-President to vote.' (Senator Borah, in letter to the writer, May 29, 1928.) 'A negative vote of the Vice-President, where the vote is a tie, is not decisive and is clearly superfluous, as the matter — with the one exception of an appeal from a decision of the Presiding Officer — is lost without his negative vote, from a parliamentary standpoint.' (Chas. L. Watkins, Journal Clerk of Senate, in letter to the writer, June 16, 1928.)

The Senate seems to have been thoroughly obfuscated by Reed's parliamentary inquiry and point of order. Several ways out of the tangle were suggested. Finally Smoot cut the Gordian knot by asking unanimous consent 'that the roll-call that was taken be set aside, and that another roll-call now take place.' There was no objection. Upon the new roll-call the yeas and nays were not evenly divided, so there was neither occasion nor opportunity for the Vice-President to record a vote.

A few days later (May 21, 1928), roll-call resulted in a tie, and the Vice-President announced: 'The Senate being equally divided, the Chair votes "Nay," and the amendment is not agreed to.' It is to be noted in this instance that the Vice-President's name had not been called. The amendment in question related to the time for the final adjournment of that session of Congress, and the Vice-President may have seen political advantage in getting himself put on record upon that issue.

<sup>1</sup> Learned, 'Casting Votes,' 571.

<sup>2</sup> *Senate Executive Journal*, V, 275.

already serving as Minister to England on a recess commission when his nomination came before the Senate. Calhoun cast a decisive vote first, January 13, 1832, to delay passing upon the nomination, and, twelve days later, to reject it. Benton declares that these ties were created for the express purpose that the Vice-President might have the opportunity to strike this blow at Jackson and his friend.<sup>1</sup> This weapon proved a boomerang, for although the attack brought Van Buren home from England, in the next election, it made him Vice-President; and, if Calhoun had not resigned,<sup>2</sup> he would have had the humiliation of canvassing the electoral votes and announcing the election of Jackson and Van Buren. A few years later, when Van Buren was Vice-President, Calhoun, at that time a member of the Senate, again worked a combination in such wise as to create a tie and force Van Buren, then a prominent candidate for the Presidency, to go on record in a way likely to injure his prospects.<sup>3</sup>

On a recent and memorable occasion, March 10, 1925, the absence of the Vice-President, making unavailable his casting vote, caused the rejection of a nomination — that of Charles B. Warren for Attorney-General — under most dramatic circumstances. When it became evident that a tie vote was likely to result, an urgent summons was sent out for the Vice-President, who had left the Capitol assured by Senate leaders that only routine business was to be transacted. As a last resort, a Republican Senator changed his vote from aye to no, in order to move a reconsideration, and thus afford time for the Vice-President to reach the Capitol. Amid wild excitement, the nomination was declared rejected by a vote of 41 nays to 39 yeas. Immediately the motion to reconsider was made, only to be followed by a motion to lay it on the table. It was while the roll was being called that Vice-President Dawes entered the Chamber. But his

<sup>1</sup> Learned, 'Casting Votes,' 572. Benton, *Thirty Years' View*, I, 215-19: 'A tie being contrived for that purpose and the combined plan requiring him to be upon record. . . . How these tie votes, for there were two of them, came to happen twice, "hand-running," and in a case so important, was matter of marvel and speculation to the public on the outside of the locked-up senatorial door. It was no marvel to those on the inside, who saw how it was done. The combination had a superfluity of votes, and, as Mr. Van Buren's friends were every one known, and would sit fast, it only required the superfluous votes on one side to go out; and thus an equilibrium between the two lines was established. . . . I heard Mr. Calhoun say to one of his *doubting friends*, "It will kill him, Sir, kill him dead. He will never kick, Sir, never kick."'

<sup>2</sup> Dec. 28, 1832 (p. 206, n. 3).

<sup>3</sup> 'It was evident that there was design to throw the bill into the hand of the Vice-President, a New Yorker and the prominent candidate for the Presidency. . . . The tie vote having been effected, and failed of its expected result, the Senate afterwards voted quite fully on the final passage of the bill and rejected it 25 to 19.' Benton, *op. cit.*, I, 587.

wild dash to the Capitol was in vain, for the motion to reconsider was tabled. Had the Vice-President been present to cast the deciding vote, Warren's nomination would have been confirmed, and a serious blow to the President's prestige averted.<sup>1</sup>

#### VOTES RELATING TO LEGISLATIVE FUNCTIONS

##### *On the Choice of Senate Officers and Committees*

Various questions have been raised as to the Vice-President's vote in breaking ties connected with the election of Senate officers and the organization of the Senate. Calhoun's casting vote in such a case December 14, 1829, aroused no objection. Twenty years later, January 9, 1850, the question was raised as to Vice-President Fillmore's right to determine such a tied election. Calhoun and Clay both supported him, and the action was approved.<sup>2</sup> In the sensational extra session of the Senate, March 4 to May 20, 1881, Vice-President Arthur used his casting vote three times to help the Republican minority in its struggle, through filibuster and delay of business, to secure control of the standing committees.<sup>3</sup> His vote defeated the adoption of the Democratic plan of committee organization; within a few minutes his vote gave approval to the Republican plan. The third casting vote six days later was merely intended to delay procedure. The ultimate result was the failure of this sharp practice to which the Vice-President of the United States three times tried to lend his aid.

##### *On Contested Elections to the Senate*

Earnest debate arose November 28, 1877, over the right of the Vice-President by his casting vote to break a tie over a contested election to the Senate. The vote which Vice-President Wheeler cast was not on the actual admission of a Senator, but on the motion to consider a report of the Senate Committee on Privileges and Elections in the case of William P. Kellogg of Louisiana.<sup>4</sup> Senator Thurman took the ground that the Vice-President was not 'a part of the House [Senate] when it comes to judge of the elections, qualifications, and returns of its members.' Senator Edmunds, on the other hand, asserted that the Vice-President might cast the decisive vote when the Senators

<sup>1</sup> *Cong. Rec.*, 101. Upon another occasion a Vice-President paired with a Senator of his own party to make a tie, and the pending nomination failed of confirmation in consequence (p. 369).

<sup>2</sup> *Cong. Globe*, XIX, 127-28.

<sup>3</sup> Learned, 'Casting Votes,' 573-74; *Cong. Rec.*, XII, 32-33; 43.

<sup>4</sup> *Cong. Rec.*, VI, 730-37; *Senate Election Cases*, 471, 490, 541, 543.



were 'equally divided,' even upon the question of Senate membership. Vice-President Wheeler declared that he had 'no doubt of his right to vote in all cases in which the Senate are equally divided.'<sup>1</sup> The Senate seemed to have acquiesced in this case, but Learned declares that 'no Vice-President has yet been able by a vote to determine the question of admitting to membership in the Senate.'

### *On Bills and Resolutions*

More than half of the Vice-Presidents' casting votes have broken ties in relation to general public bills and resolutions. In not a few instances the issues have been of momentous importance. The very first such vote in an evenly divided Senate was cast by John Adams. The real question at issue — which had been in heated debate in the House for over a month and was under discussion in the Senate for four days<sup>2</sup> — was the President's power to remove without consent of the Senate an officer whose original appointment had required the Senate's consent.<sup>3</sup> It fell to Adams to cast decisive votes on many diverse issues and he and his filial biographer took great pride in his record.<sup>4</sup> Thus, April 28, 1794, his vote was recorded against a bill to cut off all British imports until American grievances should be entirely redressed by Great Britain — a bill whose passage in Adams's opinion 'would have rendered the mission of Mr. Jay wholly abortive,' and might have precipitated war.<sup>5</sup> Three times his casting vote was required to aid a bill designed to put a stop to flagrant violations of neutrality. Matters of the utmost importance in national finance have been settled by the Vice-President's casting vote. Thus, Vice-President Clinton, February 20, 1811, voted against the bill intended to renew the charter of the first Bank of the United States. Vice-President Dallas at two junctures by his casting votes prevented<sup>6</sup> the defeat of the Walker Tariff Bill.

<sup>1</sup> He added: 'As at present advised, he will, on occasion, exercise that right in his discretion.' Mr. Eaton: 'I have no doubt that the Chair will exercise his discretion. . . . But he will permit the Senate to direct the discretion.' The Vice-President: 'The Chair will never do it without hearing the Senators at length.' As yet no Vice-President has broken a tie in an impeachment trial; but in the Johnson trial Chief Justice Chase twice gave a casting vote, and, though objection was made, the Senate sustained his action.

<sup>2</sup> 'A long time for that day in an assembly comprising only twenty-two members when full, but seldom more than twenty in attendance.' C. F. Adams, *Journal*, 116.

<sup>3</sup> Pages 58-62.

<sup>4</sup> 'This great power lodged with the Vice-President has never been brought into exercise by any subsequent occupant of the presiding chair of the Senate to the same extent that it was when Mr. Adams filled the office.' Six casting votes were given by Adams in a single session. John Adams, *Writings*, I, 457.

<sup>5</sup> Senate *Journal*, II, 70. John Adams, *Writings*, I, 457.

<sup>6</sup> Clinton and Dallas, whose casting votes affected large interests, 'each addressed

Vice-President Sherman used the casting vote only four times, but three of these were within a single half-hour, February 2, 1911.<sup>1</sup> The first two (one in Committee of the Whole and the other speedily thereafter in the Senate) saved from defeat the Administration's ship-subsidy bill. The third vote carried an adjournment of the Senate, and in effect postponed consideration of a constitutional amendment. His last casting vote was used some months later in regard to the same resolution for the constitutional amendment, providing for the election of Senators by the direct vote of the people, forcing into it the so-called Bristow amendment, a clause insisting upon the Federal Government's right to supervise senatorial elections.<sup>2</sup> Thus the vote of one man, himself not a member of the Senate, forced a change in a measure which had to be adopted — as it was, the following day — by a two-thirds vote of the members present.<sup>3</sup> This gave rise to an earnest and comprehensive debate upon the proper limits of the casting vote. Bacon denied that the Vice-President had the right to vote on a matter which did not relate to any particular proceeding of the Senate. He insisted that this resolution was simply a presentation of a proposition to the tribunal which was to determine it, which is, at last, the legislatures of the States. Inasmuch as the President has no part in this process of amending the Constitution, he asked why the Vice-President should have a part in it.<sup>4</sup>

By a singular coincidence the Vice-Presidents' votes have twice been cast upon the statement of our policy in relation to the Philippines. Eight days after the Senate had consented to the ratification of the treaty with Spain, Vice-President Hobart voted against the so-called Bacon amendment, asserting the intention of the United States, 'when a stable and independent government had been erected in the islands, to transfer to it all the right acquired from Spain and leave the government and control of the islands to their people.'<sup>5</sup>

the Senate for the purpose of justifying their votes.' Only on one other occasion has a Vice-President made such a justification. (D. D. Tompkins, Jan. 21, 1819.) H. B. Learned, 'Casting Votes,' 574.

<sup>1</sup> *Cong. Rec.*, XLVI, 1825. Comment in *Boston Herald*, Feb. 3, 1911.

<sup>2</sup> June 12, 1911, *Cong. Rec.*, XLVII, 1923.

<sup>3</sup> *Ibid.*, 1949-58.

<sup>4</sup> 'This proposing an amendment to the Constitution... is a function in all of its parts, from its beginning to its end, separate and apart from the legislative functions of the Senate, and one upon which the Vice-President has not the authority to vote.' Senator Stone made the point that this casting vote had been given while the matter was in Committee of the Whole, and that the Senate's two-thirds vote at a later stage had practically settled the issue. *Ibid.*, 1957.

<sup>5</sup> Summary of the resolution, from *Boston Herald*, Feb. 5, 1916.

The result was the adoption of the more vague and 'imperialistic' formula declaring that 'in due time' the United States would make such disposition of the Philippine Islands as would best promote the interests of the Filipinos and of the citizens of the United States — the latter, of course, being the sole judges of the interests of both! Seventeen years later Vice-President Marshall's casting vote carried an amendment to the pending Philippine bill which made the measure pledge full independence for the Philippines not later than March 4, 1921.<sup>1</sup> Vice-President Marshall again had his say as to foreign policy when he voted, April 14, 1919, to table a resolution proposed by Senator Hiram Johnson calling for the withdrawal of American troops from Russia as soon as practicable.<sup>2</sup>

Such, in brief summary, are the more significant points in the history of the Vice-President's use of the casting vote, that single attribute of power which can only be used when the Senate is tied — a contingency which, as Mr. Blaine remarked, is 'more apt to embarrass than to promote his political interests.'<sup>3</sup>

<sup>1</sup> Feb. 2, 1916. This Senate amendment was defeated in the House, 113 to 165. When it was sent to conference, the House conferees were instructed to agree to no declaration in the bill setting a definite time for giving independence to the Filipinos. As finally approved, Aug. 29, 1916, the law declared in its preamble that it had always been the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein. 64th Cong., 1st sess., ch. 415.

<sup>2</sup> *Cong. Rec.*, 65th Cong., 3d sess., 3342. In these casting votes the formula used may be of the simplest. In this case, the record reads:

The Vice-President. On the motion to lay on the table the motion of the Senator from California (Mr. Johnson), the yeas are 33 and the nays are 33. The Chair votes 'yea,' and the motion is laid on the table.

<sup>3</sup> *Twenty Years of Congress*, II, 57. Maclay records that, when John Adams broke a tie by voting for an increase in the Attorney-General's salary — a measure likely to prove unpopular — and an opponent called for the yeas and nays, Adams looked pitiful, said he would be made the scapegoat for everything. So the yeas and nays were not called. *Journal*, 157.

#### NUMBER OF CASTING VOTES, BY VICE-PRESIDENTS, APRIL 21, 1789, TO JUNE 6, 1938

1789-1797	John Adams	29	1869-1873	Colfax	13
1797-1801	Jefferson	3	1873-1875	Wilson	1
1801-1805	Burr	3	1877-1881	Wheeler	5
1805-1812	Clinton	11	1881-1881	Arthur	3
1813-1814	Gerry	8	1889-1893	Morton	4
1817-1825	Tompkins	5	1893-1897	Stevenson	2
1825-1832	Calhoun	28	1897-1899	Hobart	1
1833-1837	Van Buren	4	1909-1912	Sherman	4
1837-1841	Johnson, R. M.	14	1913-1921	Marshall	4
1845-1849	Dallas	19	1921-1923	Coolidge	0
1849-1850	Fillmore	3	1923-1925		
1857-1861	Breckinridge	10	1925-1929	Dawes	2
1861-1865	Hamlin	7	1929-1933	Curtis	3
			1933-1938	Garner	2

Figures to March 4, 1915, from H. Barrett Learned, *op. cit.*, 571, n. 1; later figures supplied by Charles L. Watkins, Parliamentarian, U.S. Senate.



Party control may find in the Vice-President's casting vote a defense the loss of which may prove disastrous. President Harding had not been dead a single day when press dispatches were emphasizing the fact that the elevation of Mr. Coolidge to the Presidency would mean the loss to the Republican Administration of the deciding vote in the event of ties, which were likely to be not infrequent inasmuch as the Republican majority in the Senate of the Sixty-Eighth Congress had practically disappeared through the functioning of various 'blocs' and the election of two Farmer-Labor Senators. Tie votes, it was forecast, could be broken in no way except by some Senator's changing his vote — something which rarely takes place.

#### THE PRESIDENT OF THE SENATE IN THE COUNTING OF ELECTORAL VOTES

---

On the day when for the first time the presence of a quorum made possible the organization of the Senate, April 6, 1789, its first act was to choose 'a President for the sole purpose of opening and counting the votes for President of the United States.' To the joint assembly, John Langdon, thus elected, announced 'that he, in their presence, had opened and counted the votes for President and Vice-President of the United States. . . . Whereby it appeared that George Washington, Esq., was elected President, and John Adams, Esq., Vice-President of the United States of America.'<sup>1</sup> Shortly before the time for counting the votes in 1793, on the initiative of the House a joint committee was appointed which reported the manner in which the electoral vote should be counted.<sup>2</sup> For almost a century the vote continued to be canvassed as provided for in concurrent resolutions by the House and Senate for the time being.

The Constitution had provided that this counting should be done 'in the presence of the Senate and the House of Representatives.' In what capacity were they present? Congress early took the ground that they were not there merely as spectators, but with a right to make the count and determine all questions which might arise as to the certificates.

<sup>1</sup> *Senate Journal*, I, 1.

<sup>2</sup> Feb. 11, 1793.

It has been vigorously maintained that in asserting this right Congress has persistently encroached on the prerogatives of the President of the Senate — that the framers of the Constitution desired that the President of the Senate should canvass the electoral votes, and that, in case of disagreement, the decision should rest with him.<sup>1</sup>

The upholders of this view lay stress upon the words of the resolution passed by the Federal Convention, which was 'ratified' by the state conventions with the Constitution, providing that the Senators, when convened at the appointed time and place (New York, March 4, 1789), should 'appoint a President of the Senate for the sole purpose of receiving, opening and *counting*, the votes for President.'

This [says Johnston] must be taken as expressing contemporary intention to cover the real *casus omissus*, viz., the neglect, refusal or inability of Congress to pass a general law for the final authentication of certificates.

Chancellor Kent is quoted: <sup>2</sup>

I presume, in the absence of all legislative provisions on the subject, that the President of the Senate counts the votes and determines the result; and that the Houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.

Support also is found in the words of Charles C. Pinckney (member of the Federal Convention) in Senate debate of 1800.<sup>3</sup>

To give to Congress thus assembled in convention, a right to reject or admit the votes of States would have been so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of.

But Pinckney's contention was that this tremendous power of inquiry and determination as to the validity of electoral votes 'rests and is exclusively vested in the States legislatures.' There is here no hint that he believed that the making of such decisions should rest with one man, the President of the Senate.

In 1821 Clay declared that in his opinion

there was no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this duty; it was a *casus omissus*;

<sup>1</sup> See Alexander Johnston's 'Elections and the Electoral System,' in Lalor's *Cyclopedia of Political Science and Political Economy*, II, 62-64; J. H. Dougherty, *The Electoral System of the United States*; C. C. Tansill, *Congressional Control of the Electoral System of the United States*.

<sup>2</sup> *Commentaries*, I, 277.

<sup>3</sup> *Annals of Congress*, X, 1130.

he thought it would be proper, either by some derivative legislation, or by an amendment to the Constitution itself, to supply the defect.

It seems more reasonable to think that this *casus omissus* was a result of inadvertence in the Convention than that its members deliberately intended (or would have tolerated the thought of) making the decision as to the validity of electoral votes a part of the 'prerogatives of the President of the Senate.' The shift from election of the President by Congress to his choice by electors came late in the Convention's sessions, and, in the scant time that remained, almost the only subject that aroused interest in regard to the election was the question of the 'ultimate choice,' and this was assigned to the two branches of Congress, severally.<sup>1</sup> That the Convention, which took pains to provide that in the very rare contingency of an impeachment trial of the President of the United States, the Chief Justice, *not* the Vice-President, should preside, should at the same time deliberately intend that every four years the Vice-President should be in position to say the deciding word as to the validity of electoral votes, seems, to use Pinckney's words, 'so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of.' It is to be remembered that under the Constitution, as it left the hands of its framers, the Vice-President would be the man who in the previous election had been the electors' second choice for the Presidency. He would, thus, almost surely be a party in interest in the next contest for that office.<sup>2</sup>

<sup>1</sup> Page 19.

<sup>2</sup> The long-continued difference of opinion as to who was entitled to decide the validity of electoral votes is indicated by the following citations:

In signing a joint resolution declaring certain states not entitled to representation in the electoral college, President Lincoln declared his own view that 'the two Houses of Congress, convened under the Twelfth Article of amendment to the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal.'

George F. Edmunds, in declaring the vote in 1885, added: 'And the President of the Senate makes this declaration only as a public statement in the presence of the two Houses of Congress of the contents of the papers opened and read on this occasion, and not as possessing any authority in law to declare any legal conclusion whatever.' (*Cong. Rec.*, 1533, Jan. 11, 1885.)

John J. Ingalls, commenting on Edmunds's statement, said: 'No sovereign ever laid down crown and scepter more absolutely, more unnecessarily, more in derogation of what might have been lawfully claimed to be the constitutional functions of the President of the Senate than was done by the Senator from Vermont on that occasion.' (*Ibid.*, 1025, Feb. 1, 1886.)

In special message to the Senate, President Grant discussed this point, in connection with the communication of his approval of the act which provided for the Electoral Commission of 1877. (*Messages*, VIII, 423.)

By a vote of 42 to 1, the Senate adopted a resolution declaring: 'That the President of the Senate is not invested by the Constitution of the United States with the right



The Vice-President of the United States, as constitutional President of the Senate, has ordinarily officiated at this ceremony; but when that office has become vacant, this duty devolves upon the President *pro tempore*, so that on several occasions this officer of the Senate's own choice has been called upon for this service.

Some Presidents of the Senate have had a keen personal interest in the ceremony. In 1793, the agreement between the Houses had been that the tellers

shall make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected.

But according to the record of what actually took place, 'the Vice-President [John Adams] opened, read and delivered to the tellers' the certificates, thus in characteristic Adams fashion asserting the exclusive power of the President of the Senate to count the votes, leaving to the tellers only to verify and tabulate the returns. Four years later Vice-President Adams again 'presided, opened and read the certificates and declared himself elected President of the United States, when the rejection of four votes which had been called in question would have defeated him and elected his opponent.'<sup>1</sup>

In 1800, Jefferson was President of the Senate at the time when it devolved upon that officer to announce the tied vote between himself and Burr, which resulted in the election of Jefferson by the House of Representatives. In 1829, Vice-President Calhoun presided over the canvass of votes which re-elected him to that office; but in 1837, Vice-President Van Buren, then President-elect, had made his valedictory in the Senate, January 28, so that the President *pro tempore*, William R. King, was the one to preside.

In 1805, for the first time the canvassing of the vote was done in public; on previous occasions the galleries had been cleared and the doors closed.<sup>2</sup>

The time was sure to come when serious differences would arise over the validity of the returns. Once and again, notably by the

to count the votes of electors for President and Vice-President of the United States so as to determine what votes shall be received and counted or what shall be rejected.' (Feb. 4, 1881, *Cong. Rec.*, 313-17; 1167-73; 1211.) This resolution was never considered in the House.

<sup>1</sup> *Writings*, I, 52. These were the votes of Vermont. Although no previous Vermont legislation had provided for their election, no formal protest was made as to the validity of the certificates.

<sup>2</sup> J. Q. Adams, *Memoirs*, I, 351.

Senate before the count of 1800, efforts had been made to provide a general regulation of the procedure in such cases, but without arriving at a decision. In 1817, after the count of all the other states except Indiana (recently admitted to the Union) had been announced, a Representative protested against the counting of the Indiana votes. Speaker Clay, whom he had addressed, stopped him, saying that the two Houses were met for but a single purpose, and they could consider no proposal and perform no business not prescribed by the Constitution. Another Representative suggested the propriety of the Senate's withdrawing to give the House an opportunity to deliberate on the question raised by one of its own members; and they withdrew. Each House deliberated separately; then they came together, and the count proceeded.<sup>1</sup>

In 1857, at the joint meeting when the votes of Wisconsin were presented, objection was raised to their being counted, the Wisconsin election having been held on a day other than the one prescribed. The President *pro tempore* of the Senate, in the Chair, ruled that debate was not in order during the counting of votes. When that process was ended, in response to a question he again ruled that a motion to exclude the Wisconsin vote was not in order, and proceeded to announce the summary of the votes including those of the Wisconsin electors. Protests arose from all sides, and there ensued a long and rambling debate. Finally the Senate withdrew, but the question was at once taken up in each House. The Wisconsin votes would not affect the decision, whether counted or not, so that it was not in a spirit of partisanship that for two days the debate of this *casus omissus* of the Constitution went forward. The most diverse views were expressed as to who under the Constitution should decide what votes were valid.

Some contented themselves with asserting that the power was in Congress to decide upon the validity of votes, leaving the method of exercising the power to be determined by law. But it was maintained in the Senate, by Mr. Thompson of Kentucky, that the 'votes are to be returned to us, and counted by us, and the House of Representatives are admitted to be present at the count to prevent a combination, a clandestine, a secret session, a *coup d'état*. . . The votes are to be returned to the Senate, and counted by the Senate.'<sup>2</sup>

<sup>1</sup> Stanwood, *A History of the Presidency*, I, 114.

<sup>2</sup> Stanwood, *op. cit.*, I, 277.

Humphrey Marshall denied the competence of the presiding officer to break up the joint meeting whenever he regarded its work as closed by going out 'with the Senate at his heels.' (*Cong. Globe*, 655-75, for debate.) Shoup comments: 'The significant

On the other hand, in the House it was maintained by several members that that body was the sole judge, on the ground that it was for the House to decide whether or not to go into an election of President. The importance of the question was clearly recognized and various proposals were presented, but the end of the session was too near to make possible the reaching of a decision. And so it was not until 1865, in the stress of war and to assure the advantage of the then Republican majority, that this disputed point was dealt with by the adoption of the hastily drawn 'Twenty-Second Joint Rule,' which for many years remained a trouble-maker. Its essential provision was that if in the joint assembly question should be raised regarding the counting of certain votes, the two Houses should separate, to enable each to make its decision; upon any such question there should be no debate in either House; and 'no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses.'<sup>1</sup>

At the count in 1869, objection was raised to counting votes of several states. On the two Houses' coming together after separate deliberation, the Senate's President *pro tempore*, Benjamin F. Wade, announced that the objections which had been raised by Representative Benjamin F. Butler had been overruled by the Senate. Butler again protested, and on being declared out of order appealed from the decision of the Chair, but Wade declined to entertain his appeal, and announced the result of the count. In the House Butler furiously denounced this procedure 'as a gross act of oppression and an invasion of the rights and privileges of the House.' His resolution was finally tabled, but not until it had for hours been the subject of bitter debate, in the course of which Republicans derided a proposal to abrogate the 'Twenty-Second Joint Rule.' It was declared to be impossible for one House to rescind a joint rule.<sup>2</sup> Nevertheless that is precisely what was done eight years later, when, in anticipation of the controversies sure to arise in counting the electoral votes of 1876, the Republican Senate voted to rescind the rule at the time when the Democratic House wanted to retain it.

The Republicans then asserted that under the Constitution the President of the Senate alone had the right to count, in spite of the fact

thing about the whole incident was that no formal declaration was made by either House; and that, although he disclaimed the power, the President of the Senate *pro tempore* by his action secured the counting of the vote of Wisconsin against what seemed to be the will of the majority party in both Houses.'

<sup>1</sup> Stanwood, *op. cit.*, I, 310-11.

<sup>2</sup> *Ibid.*, 331-32.



that the joint rule, the work of their party, had assumed the power for the two Houses of Congress. On the other hand, the Democrats, who had always denounced that rule as unconstitutional, now maintained that the right to count was conferred upon Congress.<sup>1</sup>

The passage of the Electoral Commission Act was the work of moderates of both parties, and determined that the pressing question of the day should be decided by as evenly balanced a tribunal as could be secured. Despite the tenseness of that struggle in the Commission, which lasted from February 1 to March 2, 1877, and the threats of violence which attended and followed it, ten years elapsed before Congress finally passed the act which was intended to enable a state to determine finally, through a tribunal of its own choosing, every contest arising in regard to its electoral votes.<sup>2</sup>

The application of this law to subsequent counts has practically eliminated the cause for wrangling and deadlocks over state election returns. In the resolution of Congress preliminary to the count in 1901, a slight modification was made in the law's phraseology. It had provided:

The result of the tellers' tabulation shall be delivered to the President of the Senate, who shall announce the state of the vote and persons elected, to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States.

At the insistence of some members of the House this was changed to read:

The result of the same shall be delivered to the President of the Senate who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States.<sup>3</sup>

Under the first phrasing, the President of the Senate was to declare certain persons elected. At a time when the outcome was not at all in question, it was thought best to lay down a rule whereby no Vice-President in future should do what John Adams had done a century

<sup>1</sup> Stanwood, *op. cit.*, I, 382.

<sup>2</sup> *Ibid.*, 452-56; Ch. 9, Acts of the 49th Congress; approved Feb. 3, 1887. 'It recognizes the right of Congress to decide all disputed questions in regard to the counting of the electoral votes which the state has not decided finally, or has decided irregularly.' (R. L. Ashley, 'Electoral Count for President,' in *Cyclopedia of American Government*, 658.)

<sup>3</sup> Stanwood, *op. cit.*, II, 76. For 'Regulations Governing the Counting the Electoral Votes for President and Vice-President,' see 24 Stat., 373; 25 Stat., 613. Printed in *Rules and Manual of the U.S. Senate* (1935), 187-90.

before — preside over the assembly, open and read the certificates, and declare himself elected President of the United States.

In 1909, Vice-President Fairbanks set a precedent in the way of an admonition, which has been cited on more recent occasions when the electoral votes were canvassed. At the announcement of the vote of the first state, Alabama, there was applause. The Vice-President thereupon announced:

The Chair is obliged to suggest that all manifestations of applause or approval are in contravention of the proprieties of the occasion. They disturb the dignity and decorum which should characterize the great transaction now proceeding in the presence of the American people. The Chair is confident that a repetition of this admonition will be unnecessary.<sup>1</sup>

#### ELECTION OF THE VICE-PRESIDENT BY THE SENATE

---

In the Constitutional Convention the Committee of Eleven, which reported (September 4, 1787) the proposal for transferring the election 'of the President from Congress to presidential electors, had provided that in case no candidate received a vote of the majority of the electors, 'the senate shall choose... by ballot the Vice-President.' This assignment of the 'ultimate election' to the Senate aroused great apprehension in the minds of some of the ablest members of the Convention lest, in connection with the great powers already bestowed upon that body, this should convert the Senate into a 'real and dangerous aristocracy.' Hence the contingent election of the President, in the failure of a majority in the electoral vote, was given to the House of Representatives, while to the Senate was given the less momentous contingent choice of Vice-President. This assignment was retained when the mode of election was changed by the Twelfth Amendment, but there was added the requirement that when the Senate should assemble for this election,

a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

<sup>1</sup> Feb. 10, 1909, *Cong. Rec.*, 2148.

Only once in our history has occasion arisen for the Senate to exercise this power. When the electoral votes were canvassed, February 8, 1837, the presiding officer announced that

no person had a majority of votes for Vice-President; that an election to that office had not been effected; that Richard M. Johnson, of Kentucky and Francis Granger of New York, were the two highest on the list of electoral votes, and that it devolved on the Senate to choose a Vice-President from these persons.<sup>1</sup>

The Senate forthwith withdrew to its own Chamber and determined upon the procedure to be followed. In the House, voting in a similar contingency, the vote is by states, the representation from each state having one vote. But the Constitution's provision that 'each Senator should have one vote' was held to govern not only the regular legislative procedure but also this exceptional action.<sup>2</sup> As the names of the Senators were called in alphabetical order, they voted *viva voce*. The electoral votes had been distributed among the candidates as follows:

Richard M. Johnson	147
Francis Granger	77
John Tyler	47
William Smith	23
	294

Johnson had received precisely one-half of the electoral votes; a single additional vote would have made him Vice-President. The nominal membership of the Senate was fifty-two. On the first trial Johnson received 33 votes to 16 for Granger, and was thus elected

<sup>1</sup> Stanwood, *op. cit.*, I, 187; *Cong. Globe*, IV, 167, 24th Cong., 2d sess.

<sup>2</sup> *Senate Journal*, 1836-37, 229-30.

Nevertheless, this 'contingent power' of the Senate may prove to be of unexpected significance. In the campaign of 1924 it seemed not unlikely that no candidate would receive a majority of the electoral votes, and that the election would therefore be thrown to the House. But in the House — where the vote would be taken by states — it looked as if there might result a tie, making impossible an election. Meantime, the Senate would face the task of electing a Vice-President from the highest two candidates. As the Senators would vote as individuals, and as 'insurgent' Republicans were frequently voting with the Democrats, there appeared the possibility that the combination might elect the Democratic candidate, unless a sufficient number of the conservative Democrats voted with the Republicans to defeat that result. If Charles W. Bryan, Democratic candidate upon the fantastically incongruous ticket with John W. Davis, had thus been elected Vice-President, would the duties of President have devolved on Charles W. Bryan, and would he have occupied the White House from March 4, 1925, to March 4, 1929? That such a moot question could be raised is evidence of the fact that the Constitution's provisions as to the election of President are still in serious need of amendment.

In October, 1924, Norris, who had been elected to the Senate as a 'Republican,' stated that, if the coming election of Vice-President should devolve on the Senate, he would vote for the nominee who had won the electoral votes of his state.



by a two-thirds majority. For the only time in its history of nearly a hundred and fifty years, the Senate elected the Vice-President of the United States as well as its own President for the ensuing term of four years.

### THE SENATE'S PRESIDENT PRO TEMPORE

---

The very first act of the Senate, when at last, April 6, 1789, the presence of a quorum made organization possible, was to proceed 'by ballot to the choice of a President, for the sole purpose of opening and counting the votes for President of the United States.' John Langdon of New Hampshire was elected, and forthwith, in the presence of the Senate and of the House, he counted the votes and announced that George Washington had been elected President and John Adams Vice-President of the United States. That authenticated election decreed that John Adams should be the President of the Senate. But he was not present. Accordingly, as soon as the members of the House had withdrawn, the Senate 'proceeded by ballot to the choice of a President of their body *pro tempore*.' John Langdon was duly elected.<sup>1</sup> April 21, 1789, the Vice-President appeared in the Senate Chamber and was escorted to the chair by Senator Langdon, whose service as President *pro tempore* at that moment came to an end.<sup>2</sup>

### ELECTION AND TENURE

For many years it remained the practice of the Senate, each time the Vice-President was absent, to elect a President *pro tempore*.<sup>3</sup>

<sup>1</sup> A list of all who have held this office is regularly printed in parallel columns with a list of Speakers of the House of Representatives in the *Congressional Directory*.

<sup>2</sup> Although Adams assumed the Chair immediately, the oath of office was not administered to him till June 3, 1789 — two days following the approval of the law prescribing the oath to be taken. (H. B. Learned, 'The Vice-President's Oath of Office,' *New York Nation*, March 1, 1917, 248-50.) Until 1861 the incoming Vice-President usually was sworn by the Senate's President *pro tempore*. An exception was made, March 4, 1825, when, at the suggestion of several of Jackson's close friends, 'the oldest Senator present' was called upon to administer the oath. Thus, on that occasion John C. Calhoun was sworn by Andrew Jackson.

<sup>3</sup> If the Vice-President had taken his seat at the beginning of a day's session, he was considered authorized to call a Senator to fill the Chair for the rest of that day:

What put an end to his term? That question remained an open one for nearly a century. The Constitution provides:

The Senate shall choose a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The comment in Jefferson's *Manual* runs:

In the Senate, a President *pro tempore* in the absence of the Vice-President is proposed and chosen by ballot. His office is understood to be determined on the Vice-President's appearing and taking the Chair or at the meeting of the Senate after the first recess.<sup>1</sup>

This question of tenure was the subject of an elaborate report from the Committee on Privileges and Elections, submitted January 6, 1876.<sup>2</sup> Its conclusion, from detailed study of the records, was that the President *pro tempore* was an officer of the Senate, whose term must expire whenever the absence of the Vice-President is at an end and he appears in the Senate to preside. But Jefferson's 'understanding,' cited above, that the tenure would also be determined 'at the meeting of the Senate after the first recess' the committee declared was

not only not sustained by the usage of the Senate, but is overwhelmingly contradicted by it. The four instances referred to, sustaining his theory, have been reversed by the unbroken usage of the Senate from 1803 down to the present time. (1876.)<sup>3</sup>

By unanimous consent the Senate agreed to the resolutions:

(1) That the tenure of a President *pro tempore* of the Senate, elected at one session, does not expire at the meeting of Congress after the first recess, the Vice-President not having appeared to take the Chair; and

but no such substitution extended beyond an adjournment. (E. L. Shoup, *op. cit.*, discusses these points in detail.)

The first Vice-Presidents were very diligent in attendance; but in 1826 John Randolph of Roanoke declared that Calhoun was the only Vice-President since Jefferson who had earned his salary as well as drawn it. (*Annals of Congress*, 19th Cong., 1st sess., 526.) D. D. Tompkins, Vice-President from 1817 to 25, established the record for irregularity in attendance. He is said to have appeared but rarely during his second term and not at all in his last Congress. Addition to his cups and an unwillingness to be present during discussion of certain financial difficulties in which he had been involved in controversy with the United States Government were supposed to be the reasons for his continued absence. (Hastings, *Life of D. D. Tompkins*, 113-14.)

<sup>1</sup> Sec. IX.

<sup>2</sup> *The President of the Senate pro tempore*, 62d Cong., 1st sess., S. Doc. 104 — an exceedingly detailed compilation of proceedings relating to this officer from 1789 to 1911, compiled by H. H. Gilfry, Chief Clerk, U.S. Senate. See also 44th Cong., 1st sess., S. Rept. 3.

<sup>3</sup> Forty-nine instances were cited in which the President *pro tempore* continued to serve after the first recess until the appearance of the Vice-President or the election of a successor.

(2) that the death of the Vice-President does not have the effect to vacate the office of President *pro tempore* of the Senate.

By a vote of more than two to one they then affirmed:

That the office of President *pro tempore* of the Senate is held at the pleasure of the Senate.<sup>1</sup>

In 1890 there was long debate over a resolution introduced by Senator Evarts by which the Senate resolved:

That it is competent for the Senate to elect a President *pro tempore*, who shall hold office during the pleasure of the Senate and until another is elected, and shall execute the duties thereof during all future absences of the Vice-President until the Senate otherwise order.<sup>2</sup>

Its adoption was strenuously opposed by Senator George, who contended that, with a uniformity of practice which was without a single break for a hundred years, the judgment of the Senate had been that the President *pro tempore*, elected in the absence of the Vice-President, vacates his office upon the return of that officer; and he insinuated that Senators were now calling for the election of such an officer with permanence of tenure only because the Senate a few days before had become disorganized. On the other hand, Senator Evarts and others insisted that the Constitution's phrases, 'in the absence of the Vice-President or when he shall exercise the office of President of the United States,' related not to the time of election but to the occasion and time of service of the President *pro tempore*.<sup>3</sup> Said Evarts:

It is thought by us unseemly that on casual and unpremeditated occasions we should be called suddenly into the election of a President to take the Chair when there may not be twenty Senators in their places or any considerable number that are accessible at the moment.<sup>4</sup>

The resolution was agreed to, and has resulted in greatly increased permanence of tenure. For example, William P. Frye, elected in 1896, served as President *pro tempore* during eight Congresses, until his resignation because of ill health, in 1911.

<sup>1</sup> Jan. 12, 1876.

<sup>2</sup> *Cong. Rec.*, 51st Cong., 1st sess., 2144-48, 2150-53.

<sup>3</sup> Since 1890 it has become customary to elect a President *pro tempore* in the presence of the Vice-President (e.g., Manderson, March 2, 1891; Cummins, March 5, 1921) in the regular course of organizing the Senate.

<sup>4</sup> As Senator Evarts remarked, this resolution was a mere declaration of the competency of the Senate to choose a permanent President who should take the Chair in the absence of the Vice-President. — 'It does not preclude in the least that the Senate should instantly, upon any election, limit that election to the then present absence of the Vice-President, if it should be desired.' It has been suggested that this permanency of tenure of the President *pro tempore* and the freedom given to him to designate some Senator to take his place make the Vice-President more 'foot-free for politics.'



This resignation occurred at a time when 'insurgency,' which had recently curbed the powers of the Speaker in the House, had invaded the Senate, with the result that the balance of power was held by seven 'Progressives,' who refused to vote for the regular Republican candidate. After fifteen ballots, distributed through five days compromise became necessary to enable business to go forward.<sup>1</sup> Upon motion of a Republican leader, a Democrat was unanimously elected President *pro tempore* for a single day, and thereafter for the rest of the session, ending August 26, 1912, Presidents *pro tempore* were elected for brief, designated periods, Senator Bacon, Democrat, alternating with four Republicans, some of whom served for but a single day. In the short session which ended that Sixty-Second Congress, this alternating arrangement was continued, Bacon, Democrat, and Gallinger, Republican, each serving a fortnight at a time. From April 7, 1913, to March, 1933, but four men held the position.<sup>2</sup>

At the opening of the Sixty-Eighth Congress, December 3, 1923, over the organization of the Senate there developed a deadlock similar to that of 1911, again under the inspiration of La Follette. The position of President *pro tempore* was held by the whilom 'insurgent,' Cummins, who at the same time under the seniority rule would continue as Chairman of the Committee on Interstate Commerce.<sup>3</sup> A long struggle ensued over that single committee chair-

<sup>1</sup> Neither the Constitution nor the Senate rule specifically requires election of the President *pro tempore* by a majority vote, but majority election seems to have been the invariable practice. In the House a Speaker was once elected by a plurality. H. H. Gilfry, *Senate Precedents*, 475.

In the absence of the Vice-President and pending the election of the President *pro tempore*, the Secretary of the Senate presides. The President *pro tempore* has the right to name in open session, or, if absent, in writing, a Senator to perform the duties of the Chair, but such substitution shall not extend beyond an adjournment, except by unanimous consent. See *Senate Journal*, XLVII, 58-63, Jan. 4, 1905.

The President *pro tempore* may resign his appointment by communication addressed to the Senate. G. P. Furber, *Precedents and Privileges of the Senate*, 184-86.

In contrast with the Vice-President, he may vote upon all questions. Resolution of April 19, 1922, *Senate Journal*, 1, 429.

When there is no Vice-President, or when the Vice-President becomes President, the President *pro tempore* receives 'the compensation provided by law for the Vice-President.' Stat. 1856, ch. 123; 11 Stat., 48.

<sup>2</sup> Senator Clark served until his death, and was succeeded by Senator Saulsbury, who served until a change of party brought Senator Cummins into the Chair, which he held from his election at the organization of the 66th Cong., May 19, 1919, until March 4, 1925.

<sup>3</sup> The chairmanship of that committee went to a Democrat; but Cummins, by unanimous consent, was formally assigned to membership on the committee, Jan. 10, 1924, although the minority leader and the majority whip agreed that he was entitled to membership by virtue of his having been assigned to the committee, of specified membership, April 18, 1921, to serve until their successors were appointed. *Cong. Rec.*, 778-79, Jan. 10, 1924.

manship, the Progressives refusing to vote for Cummins, although on the choice of the other officers they voted for the regular Republican nominees. To the question, 'Why do we not proceed to the election of the President *pro tempore*?' the Republican leader replied that that officer continued to hold office, 'during the pleasure of the Senate,' just as Senator Frye, without re-election had continued to hold that office through successive Congresses.<sup>1</sup> This was not challenged and Cummins continued to hold the office until the expiration of his term as Senator.

Before the convening of Congress in 1931, it was evident that an effort would be made to displace Moses, who for six years had held the position of President *pro tempore*.<sup>2</sup> It was the minority leader who smilingly called for the election of a President *pro tempore*. The first ballot showed that the Democratic nominee led Moses by a plurality of ten. The deadlock continued for a month. Insurgents would not vote for Moses, nor would they vote for a Democrat, yet it was their contention that the election of President *pro tempore* was highly privileged, and could not be displaced as the Senate's 'unfinished business,' by a mere majority vote. After futile balloting had continued for nearly a month, a Democrat made the motion that the Senate proceed to the consideration of the proposed 'Lame Duck' Amendment. Norris at once made the point of order that this motion was out of order, 'because the effect of it would be to displace as the business before the Senate the election of a President *pro tempore*, which is a privileged matter.' The Vice-President declared:

There are only three questions mentioned in the Senate Rules which are to be proceeded with until disposed of.<sup>3</sup>... Any other matter, by necessary implication, could be displaced at any time by a majority vote of the Senate by simply agreeing to a motion to take up any particular matter or measure.

The Chair overrules the point of order.

<sup>1</sup> Nevertheless, at the opening of the 67th Congress, March 7, 1921, on motion of this same Republican leader, the Senate had set the now embarrassing precedent of re-electing this same President *pro tempore*, who had served throughout the previous Congress.

<sup>2</sup> By facetiously referring to the insurgents as 'sons of the wild jackass,' Moses to a great degree had made himself personally obnoxious throughout the section from which insurgent Senators came, and, though elected as 'Republicans,' they believed that votes for Moses would lessen their popularity at home. Disturbance of Senate business for a month, during which twenty-five needless ballottings had to be taken, was a part of the penalty the country had to bear for a joker's use of that derisive phrase.

<sup>3</sup> For this debate, the ruling and the vote sustaining it see *Cong. Rec.*, 1370-71, Jan. 6, 1932.

To a parliamentary inquiry, whether if the pending motion should be carried, the President *pro tempore* would continue in office, the Vice-President replied:

He will... Under the resolution of 1890,... the President *pro tempore* serves until his successor is elected.

The Chair's ruling upon the point of order was sustained by a three-to-one vote; the 'Lame Duck' Amendment, which had been stalled behind the 'unfinished business,' was immediately debated and brought to a vote — and Moses continued to serve as President *pro tempore* to the end of that Congress, without further question.

#### THE SCOPE AND POSSIBILITIES OF THE OFFICE OF PRESIDENT PRO TEMPORE

The President *pro tempore*, as one who is chosen by and from the Senate, stands in closer and more congenial relations with that body than does the Vice-President, and from time to time a disposition has been shown to accord to the office something of the scope and power associated with the Speakership. Thus, in 1823, the Senate adopted a resolution that 'all committees shall be appointed by the *presiding officer* of this House unless specifically otherwise ordered by the Senate.'<sup>1</sup> Van Buren commented:

The Vice-President was thus enabled to put it in the power of the Senate to exercise the same privilege enjoyed by the House of Representatives — that of having its committees selected by an officer of their own choosing — by abstaining from taking his seat at the commencement of each session long enough to afford the President *pro tempore* ... an opportunity to do that duty.<sup>2</sup>

John Gaillard was the first President *pro tempore* to exercise this power. A little later, Vice-President Calhoun, as the 'Presiding Officer' of the Senate, assumed the power of naming the committees, but on this one occasion did it so unsatisfactorily that the Senate withdrew this power from both its President and President *pro tempore*.<sup>3</sup> In 1828, it was conferred upon the President *pro tempore* alone.<sup>4</sup> For many years the Senate rule has called for the election of

<sup>1</sup> 18th Cong., 1st sess., Senate Journal, 132.

<sup>2</sup> *Autobiography of Martin Van Buren* (Report, American Historical Association, 1918), II, 673.

<sup>3</sup> Page 274.

<sup>4</sup> Page 274. The Senate's shifting practice as to the appointment of committees in later years is discussed elsewhere.



committees by the Senate, but on several occasions this rule was suspended and the appointment of committees then assigned in some cases to the Vice-President, in others to the President *pro tempore*.

The President *pro tempore* has the prestige of being one of the very few officers specifically provided for by the Constitution, and the permanence of his tenure since 1876 heightens his importance. The office has usually been given to a man of experience, holding an important committee chairmanship. Geographical considerations weigh in his choice. If the majority leader is from one section, compensation is sought by selecting the President *pro tempore* from that other section which will most strengthen the party.<sup>1</sup> The office comes into exceptional prominence when the Vice-Presidency becomes vacant. In that case the President *pro tempore* becomes not the contingent but the regular presiding officer of the Senate. As the elect of a party majority in that body he can use his power of recognition and administer the other rulings of the Chair with greater regard for party advantage than would be tolerated in any Vice-President. In 1866, the choice of President *pro tempore* turned on political considerations entirely aside from the elementary qualifications of a presiding officer.

Those who favored impeachment [of President Johnson] gradually united on Wade as the man for the crisis. Probably no man less fitted for the duties of a presiding officer could be found in the Senate. He himself confessed: 'You all know I am no parliamentarian.' . . . But he was chosen for a purpose in comparison with which such duties were trivial.<sup>2</sup>

Yet, although from time to time the President *pro tempore* may make the few committee appointments permitted to the presiding officer and may exercise some influence over what measures shall pass, this 'constitutional' officer does not have the degree of control possessed by the majority leader, who owes his position to choice by the party conference of which he is chairman.<sup>3</sup>

<sup>1</sup> In the 66th, 67th, and 68th Congresses the President *pro tempore* was Cummins (Iowa); the majority leader, Lodge (Mass.). In the next Congress, Curtis (Kan.) became majority leader, and Moses (N.H.), President *pro tempore*. At times the position of President *pro tempore* has figured in hard-fought contests. See account of the bargain by which Thomas F. Bayard was ousted and David Davis placed in the Chair in 1881. George F. Hoar, *Autobiography*, II, 65.

<sup>2</sup> David M. DeWitt, *The Impeachment and Trial of Andrew Johnson*, 179. *Cong. Globe*, 39th Cong., 2d sess., 2003.

<sup>3</sup> Woodrow Wilson, *op. cit.*, 133. Of course the fact that the Vice-President at any time may appear and assume the Chair limits any evolution of the office of President *pro tempore* into a position of vital leadership.

In case of temporary absence from the Senate, the President *pro tempore* is authorized to communicate through the Secretary his appointment of a designated Senator 'to perform the duties of the Chair this legislative day.'

THE SENATE'S PRESIDENT PRO TEMPORE IN THE LINE OF SUCCESSION TO THE PRESIDENT OF THE UNITED STATES

For a century a heightened interest, dignity, and importance attached to the office from the fact that the Act of 1792 provided that, in case the offices of both the President and the Vice-President should become vacant, the President *pro tempore* should assume the duties of the President of the United States.

Madison believed that this decision to place the President *pro tempore* in the line of succession instead of the Secretary of State, as Madison had proposed, 'proceeded mainly, if not exclusively from feelings of personal and political enmity to the gentleman who then filled the office of Secretary of State [Jefferson] and the jealousy entertained of him by friends and partisans of the Secretary of the Treasury [Hamilton].'<sup>1</sup>

The persistent tradition that one Senate President *pro tempore*, D. R. Atchison, thus actually became 'President of the United States for a single day' is entirely without foundation.<sup>2</sup> Atchison had been President *pro tempore* in the Senate of the Thirtieth Congress, but with the end of that Congress, March 4, 1849, his own term in the Senate expired. The very first motion passed after the Senate of the Thirty-First Congress was called to order was that the oath of office be administered to David R. Atchison, 'Senator-elect from the State of Missouri; and that he be, and hereby is, chosen President of the Senate *pro tempore*.' Whoever was President of the United States on the afternoon of that Sunday and the morning of that Monday, it is clear that Atchison was not, for his term had ended in the one Congress, and he had not qualified in the succeeding one, so that in those hours the office of the Senate President *pro tempore* was vacant.

In order that a Senator might be in a position to take upon himself the duties of President of the United States if the necessity should arise, a precedent, set by John Adams and scrupulously followed by Jefferson and Burr, was established whereby the Vice-President would absent himself — 'out of courtesy, not necessity,' as Senator Evarts insisted — a day or so before the end of the session, to afford the Senate an opportunity to elect a President *pro tempore* who should hold office during the recess.

<sup>1</sup> E. L. Shoup, *op. cit.*, 90; *Cong. Rec.*, 49th Cong., 1st sess., 914.

<sup>2</sup> For the assertion that Atchison did thus become President, see sketch of D. R. Atchison in *U.S. Biographical Congressional Directory, 1774-1911*. The episode is discussed in detail in 'President of the United States for a Single Day,' by George H. Haynes, in *American Historical Review*, Jan., 1925.

In the face of this precedent, in 1813, Vice-President Gerry held his seat to the very end of the session, later explaining that he had 'felt himself to be differently circumstanced from any of his predecessors' and under obligations to hold his post until the completion of the business of the session.<sup>1</sup> It has been surmised that the real reason for his decision lay in the political exigencies of the time. President Madison was seriously ill. The war was going badly and Madison's Administration was constantly beset by malcontents in the Senate, who might succeed in electing one of their number President *pro tempore* if Gerry's withdrawal for a day should give opportunity for an election. Gerry is believed to have made the forecast that if no President *pro tempore* were elected, and then both he and the President should die during the recess, the succession in that contingency would go to the Speaker of the House, Henry Clay, a loyal supporter of Madison and in thorough accord with his attitude toward the war.<sup>2</sup>

In the impeachment trial of President Johnson a single additional vote for conviction would have removed him from office and have placed in the White House the ranting 'Bluff Ben Wade,' who was then President *pro tempore* of the Senate. Within two months after his acquittal, Johnson sent a message to Congress, calling attention to the objections to designating, in the line of succession to the Presidency, either the Chief Justice of the Supreme Court or the President *pro tempore* of the Senate, since both were 'interested in producing a vacancy.' He strongly urged the enactment of a new succession law.<sup>3</sup> Naturally, Johnson's words, especially upon this subject, carried no weight with Congress, nor was any remedy applied until nearly twenty years later, after two experiences had shown how serious were the defects in the existing law.

In March, 1881, the casting vote of the Vice-President was necessary to secure for the Republicans the organization of the Senate.

<sup>1</sup> Aug. 2, 1813. *Annals of Congress*, 13th Cong., 2d sess., part 1, 776-78. Senator Hoar says that there have been but two instances of such refusal to vacate the Chair, the other being that of Vice-President Arthur in 1881. (*Autobiography*, II, 169.)

<sup>2</sup> H. Barrett Learned, 'Gerry and the Presidential succession,' *American Historical Review*, XXII, 94-97.

<sup>3</sup> In April, 1814, however, Gerry complied with the custom which he had disregarded the previous year. 'Tomorrow I shall bid the Senate adieu, as soon as a quorum is formed, and according to custom give them an opportunity to choose a President *pro tempore*, to succeed to the Chair of the Presidency in case of the Exit during the recess, of the President and myself.' Letter to Mrs. Gerry, April 17, 1814, *Proceedings of Massachusetts Historical Society*, June 14, 1914, XLVII, 502.

<sup>4</sup> *Messages*, VI, 642, July 18, 1868.



Under those circumstances their ability to elect a President *pro tempore* was so uncertain that Vice-President Arthur, like Gerry in 1813, 'sat the session out,' and Congress adjourned, May 20, with no one beyond the Vice-President in the line of succession. President Garfield was shot, July 2, and died September 20. Had Arthur died between that date and action by Congress which Arthur summoned for October 10, no one would have been legally qualified to assume the office of President.

Four years later, Vice-President Hendricks continued to occupy the Chair till the end of the short session, April 2, thus preventing the Republicans, then in majority, from choosing a President *pro tempore*. He died November 25. The House of the Forty-Ninth Congress had never met, so that from November 25 until the convening of Congress there would have been neither President *pro tempore* of the Senate nor Speaker of the House to fill the vacancy, if Cleveland had died during that interval. In December, the Senate promptly elected, as its President *pro tempore*, John Sherman, and thus placed that stalwart Republican in the line of succession to Cleveland!

To remedy these serious defects a new Succession Act, originating in the Senate, was passed, excluding both the President *pro tempore* and the Speaker, and transferring the succession to members of the Cabinet.<sup>1</sup>

This change has been severely criticized.

Thus the Presidential succession was taken away from officers of the government elected by the people, and transferred to those owing their position to presidential appointment. It cannot be doubted that a serious mistake was thus committed.<sup>2</sup>

This verdict seems better grounded in theory than in experience. The succession of the Secretary of State to the Presidency gives at least some assurance that the major policies which received the people's

<sup>1</sup> Senator Hoar had steadfastly urged, since 1881, the passage of a new Succession Act. In 1884 it was passed by the Senate, but the House failed to adopt it. After Hendricks's death, Hoar renewed his efforts, and the present law went into effect, Jan. 19, 1886. G. F. Hoar, *op. cit.*, II, 168; J. F. Rhodes, *History of the United States from the Compromise of 1850*, VIII, 262.

<sup>2</sup> George Rothwell Brown, *The Leadership of Congress*, 19. Congressman William McKinley, seeking to keep the succession in the line of officers elected by the people, offered a substitute which would have retained the essential features of the law of 1792, but would have provided that whenever a vacancy exists either in the office of President *pro tempore* of the Senate or Speaker of the House, the President shall convene the House in which the vacancy exists for the purpose of electing a presiding officer. This was rejected by a vote of 108 to 159. *Ibid.*, 19-21; *Cong. Rec.*, 49th Cong., 1st sess., 670.

approval at the preceding election in their choice between candidates for the Presidency will be consistently carried forward. Senator Hoar, who drew up and introduced this Succession Act, called attention to the long term of Senators which increased the likelihood of a Senate President *pro tempore* being out of harmony with the people's wishes as indicated at the previous election. He also cited the list of Secretaries of State, with the comment:

These men, with scarcely an exception, have been among the foremost statesmen of their time. . . . On the other hand, the list of Presidents of the Senate contains few names of any considerable distinction.<sup>1</sup>

In general, nominating conventions and 'the people' have given scant attention to the real qualifications which should govern the choice of the President's possible successor. If, as evidence of the President's lack of discrimination or sense of responsibility in choosing his successor, there be cited such misfit appointments to the position of Secretary of State since 1887 as the senile John Sherman, 'elevated' from the Senate to make a vacancy for Mark Hanna, or William Jennings Bryan, already thrice rejected for the Presidency by the people, it is well to recall such incongruous selections 'by the people' as Vice-Presidents John Tyler and Andrew Johnson. Nor did the Senate show greater discernment when by choosing the President *pro tempore* they deliberately placed in succession to the Presidency Jesse D. Bright, who within a year was expelled by the Senate for treason, or the ranting Wade, whom a single added vote for Johnson's conviction would have placed in the White House.

#### OTHER SENATE OFFICERS

---

The Senate shall chuse their other Officers, and also a President *pro tempore*.<sup>2</sup>

The Constitution thus gave to the Senate a wide scope of self-government. With the exception of the one officer specified, the Senate might determine what officers it needed, the method of their 'chusing,' and their tenure.

<sup>1</sup> *Autobiography*, II, 167-71.

<sup>2</sup> Constitution, art. I, sec. III, par. 6.

On the very day when the Senate first secured a quorum, it elected its President *pro tempore*, and the following day a Doorkeeper. April 8, 1789, the balloting for Secretary resulted in the choice of Samuel A. Otis, and from the list of petitioners for employment as 'attendants on the Senate' a Messenger was elected. The list of officers directly chosen by the Senate has varied from time to time, but it has never grown long. At the present time it includes but six: the President *pro tempore*, Secretary, Sergeant-at-Arms and Doorkeeper, Chaplain; Assistant Doorkeeper, and Acting Assistant Doorkeeper. But the functions of some of these officers are so important, their clerical and executive staffs are so extensive, and the expenditures which they administer are so large that their 'chusing' has often been a matter of eager and partisan contest.<sup>1</sup>

Until 1824, the Senate chose its officers to serve during good behavior. In that year it was provided that their election should take place at the beginning of the first session of each Congress.<sup>2</sup> For twenty-five years this practice continued, but in 1849 Benton submitted a resolution for the repeal of the rule requiring biennial elections. He declared that from the moment of its adoption the Senators had found that there was 'a concentration of all the rejected applicants — and, God knows, their name was Legion — upon the Senate for places.' He urged the repeal in the hope that thereby the Senate

will free its members from the importunities of these applicants, and its officers from the anxieties occasioned by the consciousness that there are legions of office-seekers endeavoring to undermine them; and that we will retain in our own hands, as we have the full right to do, the power of discharging an incompetent officer on any occasion.

The repeal was agreed to without a dissenting voice.<sup>3</sup> Two years later an attempt was made to restore biennial elections on the ground that the existing practice 'establishes a principle anti-republican in its character,' but its defenders insisted that there was no 'life estate in the ministerial officers of the Senate'; that by resolution at any moment the Senate had the power to displace any one of these officers who might act improperly, but that such offices, in which experience was a prime consideration, ought not to be made 'the subject of con-

<sup>1</sup> In organizing the Senate in 1881 control of the offices was traded for control of the committee assignments (p. 236).

<sup>2</sup> Jan. 26, 1824, after repeated consideration. *Annals of Congress*, 143.

<sup>3</sup> Feb. 9, 1849. *Cong. Globe*, 490.



tention and strife.'<sup>1</sup> By a narrow margin the proposal was defeated.

In the decade before the Civil War the Democrats retained undisturbed control of the major Senate offices. When the Republicans secured a majority in the Senate in 1861, under the leadership of Hale they placed members of their own party in the two offices of Secretary and Sergeant-at-Arms, but left many of the staff undisturbed. When the Democrats regained control of the Senate in 1879, however, they promptly made a clean sweep, in the face of protest by Anthony, who declared that fully thirty of the offices of the Senate were at that moment held by Democrats, 'some of whom we found in office, when we came into power, in 1861, and others have since been appointed through the liberality of the appointing power.' He deplored the inevitable lessening of efficiency sure to result from replacing, for partisan reasons, officers of long experience and intimate knowledge of the Senate's work, by men who were strangers to its technique.<sup>2</sup>

The Senate has been held to be a continuing body. Accordingly its officers have no stated term of office, but serve until their successors are selected.<sup>3</sup> In recent years, however, it has been the custom to re-elect other officers than the President *pro tempore* at the beginning of each Congress. Election by ballot has been held to be required by the Senate rule only in the formation of committees — and even that requirement by unanimous consent is now invariably suspended.<sup>4</sup> For years, at the opening of each new Congress the procedure has

<sup>1</sup> Bright and Douglas advocated the return to biennial election; Berrien and Butler opposed it. December, 1851, *Cong. Globe*, 62.

<sup>2</sup> March 24, 1879, *Cong. Rec.*, 47 ff. In justification of the Democrats' action, Bayard alleged that the Secretary of the Senate had been engaged in partisan activities, and that the Chief Clerk was a 'poor reader.'

<sup>3</sup> In debate (Dec. 17, 1923, *ibid.*, 325) Lodge asserted that the other Senate officers were elected 'under totally different resolutions of the Senate' from that which governs the choice of President *pro tempore* (*supra*, 254), citing *Senate Rules*, 1.

Walsh (Mont.): Does the Senator take the position that the terms of the other officers expire with the Congress?

Lodge: I think under the law they do.

Curtis dissented: I think the officers mentioned hold until their successors are elected. That was so ruled by Vice-President Marshall. In recent years it has been the custom to re-elect them at the beginning of each Congress.

Walsh agreed with Curtis, that the other officers, like the President *pro tempore*, hold their positions at the pleasure of the Senate. The elaborate report upon 'President *pro tempore* of the Senate,' of Feb. 6, 1876 (reprinted in report of May 16, 1911, S. Doc. 30), declared: 'The Committee are of opinion . . . that the other officers of the Senate are at all times under the control of the Senate and may be changed at its pleasure. This is certainly established by usage as to the Secretary, Sergeant-at-Arms, and Chief Clerk.'

<sup>4</sup> Page 277.

been for the majority leader to move that 'the Senate do proceed to the election of the following officers in the order named.' After this resolution has been passed, he presents individual resolutions — 'that — be, and he hereby is, elected Secretary of the Senate,' etc. A test of party strength is secured by the minority leader's offering amendments to substitute for the nominations made for Secretary and Sergeant-at-Arms the names of men put forward by the minority conference.<sup>1</sup>

#### THE SECRETARY OF THE SENATE <sup>2</sup>

The Secretary is in charge of the clerical services connected with the Senate as a legislative body. He also is responsible for the disbursement of all money in the Senate, not only for the members' salaries and mileage, but for compensation of hundreds of Senate employees and payment for various other services. Directly connected with the office of the Secretary are some thirty officers and clerks. By an informal 'gentlemen's agreement' three of these positions, involving great responsibility and skill, are considered to be on the 'permanent' or 'efficiency roll.' The others are filled by 'patronage,' apportioned between parties in accordance with their leaders' agreement.<sup>3</sup>

From the beginning of the Government under the Constitution to the end of the Seventy-Fifth Congress in 1938, this office had been held by only fifteen men, with an average service of ten years.<sup>4</sup> Samuel A. Otis, who had been a member of the convention which framed the Massachusetts constitution of 1780, and later a delegate in the Continental Congress, was elected to this office in the first week of the Senate's existence, and when he died in service, twenty-five years later, the Senate passed a resolution in appreciation of his long and

<sup>1</sup> The nominations for Assistant Doorkeeper and Acting Assistant Doorkeeper are presented in a single resolution, and no substitutes are usually offered, as it is the understanding that the latter nominee has been put forward by the minority. (Page 265.) The four officers named above are usually men of long political experience. The Chaplain of the Senate frequently continues to serve without biennial re-election.

<sup>2</sup> The duties of the Secretary of the Senate are codified and set forth in the annual edition of the *Senate Manual*.

<sup>3</sup> Some 650 names are on the Senate pay-roll, 235 of them being directly in the service of the Senate, ranging from the Secretary to the pages. There are about 415 clerks, assistant clerks, clerks to committees and to Senators. Under the Standing Orders, the Secretary is required to report whether Senate employees and messengers 'have been usefully employed; whether the services of any of them can be dispensed with without detriment to the public service, and whether the removal of any particular persons and the appointment of others in their stead are required for the better dispatch of business.'

<sup>4</sup> Two Secretaries *ad interim*, who served but a few days, are not included in the list of fifteen.

faithful services, and providing that the Senators 'go into mourning for one month, in the usual method, of wearing crepe around the left arm.'<sup>1</sup>

At each change of party control in the Senate, this highly salaried and most responsible position goes to the man who is the choice of the new majority, and he usually holds that position until there comes another shift in politics. Experience and wide acquaintance count for much in the efficiency of the office, and the choice is likely to go to some man who for years has seen activities in the Capitol at close range.<sup>2</sup>

#### THE SERGEANT-AT-ARMS AND DOORKEEPER

On the day following the first organization of the Senate there was chosen a Doorkeeper — an especially suitable officer for a legislative body whose sessions were to be secret. A few weeks later Vice-President Adams 'made his speech on the subject of our having a Sergeant-at-Arms. He seemed to wish that the officer should be Usher of the Black Rod. He described this officer as appurtenant to the House of Lords.'<sup>3</sup> But not till many years later, despite Adams's urging, was the title changed to 'Sergeant-at-Arms and Doorkeeper.'

This officer executes the Senate's orders as to decorum both on the floor of the Chamber and in the galleries. He takes persons into custody in case of contempt of the Senate; arrests and detains them as ordered; and hales absentees into the Senate Chamber when required so to do, to complete a quorum.<sup>4</sup> He is responsible for the enforcement of all rules made for the regulation of the Senate Wing of the Capitol.<sup>5</sup> He directs the management of the Document Room, and is custodian of all property belonging to the United States committed to his care.<sup>6</sup>

<sup>1</sup> From the first, it was charged that Otis was elected and kept in office by 'influence,' and the carping Maclay recorded complaints of his inaccuracy and inefficiency. Plumer (*Memorandum*, 597) gave an account of a Republican caucus in 1807 at which the removal of Otis was debated at great length, but the opposition to him seems to have dwindled when he transferred the Senate's printing jobs to another printer!

Otis's record of twenty-five years of service was almost equaled by that of Asbury Dickens, Secretary from 1836 to 1861, despite the changes in party majorities.

<sup>2</sup> In 1933, the Democratic majority elected as Secretary of the Senate Edwin A. Halsey, who had begun his official life at the Capitol more than thirty years before as a Senate page, had then advanced to a seat in the press gallery, and had later served for many years as secretary of the Senate Democratic majority or minority, as the case happened to be.

According to press comment, during the 75th Congress, because of the highly exclusive party conferences convened in the Secretary's office, that relatively small and inaccessible apartment came to be known as 'God's Room.'

<sup>3</sup> Maclay, *Journal*, 31, May 12, 1789.

<sup>4</sup> Page 352 ff. For summary of his duties see *Senate Manual*.

<sup>5</sup> See Rules for the Regulation of the Senate Wing.

<sup>6</sup> See the elaborate inventory which he is required to submit on the first day of each session.



He appoints all messengers, pages, and laborers, and may deputize duties in relation to the legislative sessions to the Assistant Door-keepers. He is further authorized to appoint such special deputies as he may think necessary to serve process and perform the other duties devolved upon him by the law or by the rules or orders of the Senate. Sometimes he has to choose between conflicting authorities.<sup>1</sup> He is always 'constructively present' in the Senate Chamber. Offending members, officers of the Senate, and recusant witnesses are committed to his custody. The office has been one of long tenure. In the first century of its existence it was held by only twelve men.<sup>2</sup> The longest tenure has been that of David S. Barry, 1919 to 1933.<sup>3</sup>

#### THE DEPUTY SERGEANT-AT-ARMS AND STOREKEEPER

To this officer are deputed, as may become desirable, many of the duties of the Sergeant-at-Arms. For example, he may be sent to one state to impound ballot-boxes at the behest of one Senate investigating committee, or to another state to serve notice upon a recalcitrant witness. He is also the storekeeper of the extensive and most varied assortment of United States property of which his office has been placed in charge.

<sup>1</sup> Thus, in 1927 the Sergeant-at-Arms declined to carry out the orders of the 'Slush Fund Investigating Committee' when the Chairman of the Auditing Committee refused to sign warrants for its expenditures (p. 737).

<sup>2</sup> McKee, *Red Book of the United States*, 46. *A Manual of Congressional Practice* (1891).

<sup>3</sup> Barry had made his first acquaintance with Congress as a Senate page in 1875. With the exception of some years as editor of the *Providence Journal*, his later life was spent in the Capitol, in the press gallery, as secretary to Senator Aldrich, and from 1919 as Sergeant-at-Arms. In 1924 he brought out a discerning book, *Forty Years in Washington*. In the *New Outlook* (Feb., 1933, 40-43) was published an article by him which aroused a storm of protest in the Senate. The passage which most affronted the Senate in this article, 'Over the Hill to Demagoguery,' was the statement:

Contrary, perhaps, to the popular belief, there are not many crooks in Congress, that is, out-and-out grafters, or those who are willing to be such; there are not many Senators or Representatives who sell their vote for money, and it is pretty well known who these few are; but there are many demagogues of the kind that will vote for legislation solely because they think that it will help their political and social fortunes.

Forthwith he was haled before the Committee on the Judiciary, asked to explain that statement. He declared that his purpose in writing that article had been to 'proclaim the integrity of Congress as a whole' against what he said was a popular impression that Congress is full of grafters. He denied that he had personal knowledge of any specific instances of vote-selling. The explanation was not satisfactory to the committee, which brought in a report recommending that Barry — who had already been suspended — should be removed from his position. This gave rise to a long and bitter debate, which ended in the adoption of the committee's recommendation by a vote of 53 to 17. (Feb. 7, 1933, *Cong. Rec.*, 3511-30.)



THE MARBLE ROOM IN THE SENATE WING





## THE ASSISTANT DOORKEEPER AND ACTING ASSISTANT DOORKEEPER

These officers are on the list of those who by custom are elected by resolution at the beginning of each Congress. During the daily sessions they are on the Senate floor, seeing that the various messengers are at their posts, and that at least five minutes before the opening of the session the floor and the cloakrooms are cleared of all persons not entitled to remain there. In the absence of the Sergeant-at-Arms, his duties devolve upon these officers in the order of their rank.

It has long been the custom in the Senate — and in the House, as well — to permit the minority to choose the Acting Assistant Doorkeeper, who shall be at their service. Question has rarely been raised to the right of the minority to choose this one officer, whose service is largely a confidential one.<sup>1</sup> He is posted as to the minority Senators' plans, and it is through him that pairs are arranged.

## THE CHAPLAIN

Before the Senate had been organized ten days, it passed a resolution, in which the House later concurred, providing that two Chaplains of different denominations be appointed, one by the Senate and the other by the House, who should 'commence their services in the Houses that appoint them, but shall interchange weekly.'<sup>2</sup> For more than sixty years, in accordance with concurrent resolutions, this custom of interchange continued, until it was interrupted by the prolonged Speakership contest of 1855. The Chaplain's position did not become a definitely recognized Senate office till 1862.

Even over the election of Chaplain there have at times been lively struggles: in 1833 six ballots were necessary to determine the Senate's choice. The Chaplain's services are not onerous. At the stroke of the hour appointed for the opening of the session of each legislative day, the Presiding Officer mounts the platform, followed by the Chaplain. Pages are already standing before the front row of desks. At a single stroke of the gavel, Senators present — often very few — stand, and the Chaplain offers a brief prayer. He officiates at memorial services of deceased Senators, and upon other ceremonial occasions.

<sup>1</sup> So Lodge stated in debate, March 13, 1913, when the Democratic leader included this officer in his list submitted. Bacon (Dem.), in agreement with Lodge, declared: 'The responsibility is with the minority. . . . When we seek to pass upon the question whether they have selected a fit man, we assume that which we ought not to assume.'

<sup>2</sup> The Senate's first Chaplain was the Right Reverend Samuel Provoost, Bishop of New York, who had for years been Chaplain of the Continental Congress. In 1903, Edward Everett Hale, upon nomination of his friend, Senator Hoar, became the well-beloved Chaplain of the Senate.

## MESSENGERS AND PAGES

Associated with the office of the Sergeant-at-Arms are a number of minor officers, messengers acting as assistant doorkeepers and in other capacities, and pages. A few of these positions are upon the 'permanent' or 'efficiency' list, but most of them are filled by patronage. The youngest employees of the Senate are the pages, alert boys none of whom may be appointed younger than twelve, nor may remain on the roll after reaching the age of sixteen, or for a longer time than two Congresses, or four years. They are so classified that one-half of them shall end their service during each Congress. By Act of Congress, government employees were excluded from the operation of the child-labor law. Later, when a compulsory-school law was enacted for the District of Columbia, setting a minimum both as to age and grade unless the child employee were being given instruction by tutoring or in school for a stipulated number of hours each week, a teacher was engaged and a class formed at the Capitol for pages between the ages of twelve and fourteen.

The pages go upon all manner of errands for the Senators, especially carrying messages and fetching needed books, documents, and refreshments. Quite a number of them grow up in the service, being graduated from the rank of pages into that of messengers and clerks. In later years some find their way back to the familiar Chamber as members of the Senate. Arthur Pugh Gorman may have owed some measure of his astuteness as a politician to his service in boyhood as a Senate page.

## LEGISLATIVE COUNSEL OF THE SENATE

By the Act of 1919 it was provided that the Legislative Drafting Service thereby created should be under the direction of two officials having the title of Legislative Counsel, one appointed by the President of the Senate and the other by the Speaker of the House, without reference to political affiliations and solely on the ground of fitness to perform the duties of the office.<sup>1</sup> Half of the annual appropriation for this service is disbursed at the discretion of the Legislative Counsel of the Senate, who is authorized to employ and fix the compensation of such staff members as he deems necessary for the proper carrying-on of the work of the office. In 1935, the staff comprised the Legislative Counsel, two Assistant Counsels, a Law Assistant, and two clerks. The service of this office is not available for the individual Senator,

<sup>1</sup> 65th Cong., 3d sess., ch. 18 (1919), 1141.

but for Senate committees. The Legislative Counsel is authorized to apportion the time and services of the office among the committees requesting its assistance.

#### OFFICIAL REPORTERS OF DEBATES

A highly important and responsible service is performed by Reporters of Debates.<sup>1</sup> In 1935 there were five men on this staff.<sup>2</sup>

#### LIBRARIAN OF THE SENATE

The Librarian of the Senate, with a staff of three, has charge of the Senate Library, a working library for Senators, in a suite of rooms on the top floor of the Senate Wing of the Capitol.

#### REFERENCES

- 
- Hatch, Louis C. (Shoup, Earl L., ed.). *A History of the Vice-Presidency of the United States*. New York, 1934.
- Learned, H. Barrett. 'Casting Votes of the Vice-Presidents, 1789-1915,' *American Historical Review*, XX, 571-76.
- Learned, H. Barrett. 'Some Aspects of the Vice-Presidency,' *Proceedings of the American Political Science Association*, IX, 162-77.
- Shoup, Earl L. *The Vice-Presidency of the United States*, Doctoral Thesis, in manuscript, Library of Harvard University, 1912.
- Gilfry, H. H. *The President of the Senate pro Tempore*, 1789-1911.
- The President of the Senate pro Tempore*. 62d Cong., 1st sess., S. Doc. 104.
- McKee, T. H. *A Manual of Congressional Practice*. 1891. (*Red Book of the United States*.)
- Rules and Manual of the United States Senate*.
- Maclay, William. *The Journal of William Maclay*.
- Plumer, William. *Memorandum of Senate Debates*, 1802-1807.
- Biographies of Vice-Presidents; especially: Adams, Jefferson, Burr, Calhoun, Van Buren, Marshall.

<sup>1</sup> For comment on publicity of debates, see pp. 905-06.

<sup>2</sup> Mention should be made of the astonishing record of Thomas F. Shuey, who continued to serve for practically sixty-five years. He joined the reporting staff of the Senate Dec. 22, 1868, and served without absence for a single day until within three weeks of his death, May 18, 1933. He was held in the highest regard by successive generations of Senators, as 'the beau idéal of a legislative amanuensis' — diligent, prompt, efficient, and accurate.





# VI

---

## SENATE COMMITTEES

---

---

★

It is not far from the truth to say that Congress in session is Congress on public exhibition, while Congress in its committee rooms is Congress at work.

WOODROW WILSON

The committee feature of Senate procedure is supreme in any consideration of the control of the Senate.

GEORGE H. MOSES

There are no insignificant Members of Congress, when it comes to votes in the committee room.

ROBERT LUCE

---

★



# VI

---

## SENATE COMMITTEES

---

### DEVELOPMENT FROM SPECIAL TO STANDING COMMITTEES

---

ONLY slowly and hesitatingly did the Senate come to devolve a large part of its work upon standing committees — a step which the House had been obliged to take many years earlier.

Reluctance to delegating power and responsibility was characteristic of the period. In the Senate it seemed the less justified both because in early years much of its business was less pressing than that of the House and because the Senate was so small a body. In the First Congress the total membership of the Senate was but little larger than that of several of its major committees of today.<sup>1</sup> The Senate's longer term, also, conduced to close acquaintance, and lessened the need for prolonged committee consideration. Until 1816, the Senate had made provision for only four standing committees, and two of these were joint committees in the forming of which the Senate had acquiesced at the request of the House.<sup>2</sup> The practice had been to 'raise' these committees at each session of Congress succeeding the date of their organization.

For the rest, dependence was placed upon select committees,

<sup>1</sup> Till the middle of July, 1789, the Senate had but twenty members. In 1935 the authorized membership of the Committee on Appropriations was 24; of Foreign Relations, 23; and three other committees under the rules were allowed 20 members.

<sup>2</sup> Joint Standing Committee on Enrolled Bills, to which the Senate made its first appointment, Mr. Wingate, July 31, 1789; Senate Committee on Engrossed Bills, March 26, 1806; Joint Standing Committee for the Library, Dec. 17, 1806; Senate Committee to Audit and Control the Contingent Expenses of the Senate, Nov. 4, 1807. (H. H. Gilfry, *Senate Precedents*, I, 267; Miss C. H. Kerr, *op. cit.*, 26.) The Committee on Library dealt with the purchase of books. In a way, the work of any one of these committees was administrative rather than strictly legislative.

usually of three members, named as the occasion for such service arose. This was of such common occurrence that in the session of 1815-16 between ninety and one hundred such committees were designated.<sup>1</sup> The results were not so inconsistent and dispersive of responsibility as this statement might indicate. As early as 1801 the Senate rules had provided:

When any subject or matter shall have been referred to a select committee, any other subject of a similar nature may, on motion, be referred to such committee.<sup>2</sup>

This sensible provision had been largely followed in practice. Thus, during the first four Congresses all the committee work on treaties was done by twenty-four Senators, only two more than one-third of all the Senators in service during that period. But the concentration was in fact far greater than is thus indicated; for of the twenty-four men named for this committee work on treaties, five — the most powerful Federalist members of the Senate — held more than half of the sixty-eight places.<sup>3</sup> Thus, long before there was any standing Committee on Foreign Relations, this small group was accorded almost as much concentration and continuity of responsibility as in later years gave to the committee of that name dominance in the Senate.

Yet the needless inconvenience of the frequent choice of select committees taxed the Senate's patience. At the opening of the second session of the fourteenth Congress a motion, that the Senate raise thirteen select committees for the consideration of the various portions of President Madison's annual message, was laid over; and a few days later<sup>4</sup> in its place there was passed a resolution, introduced by Senator Barbour of Virginia, that eleven additional standing committees should be appointed at each session; namely, Committees of Foreign Relations, Finance, Commerce and Manufactures, Military affairs, the Militia, Naval Affairs, Public Lands, Claims, the Judiciary, the Post Office and Post Roads, and Pensions.<sup>5</sup> To this wholesale

<sup>1</sup> *Statement of the rules and practices of the Senate of the United States, in the appointment of its committees, 1789 to 1863*, by W. Hickey, Chief Clerk of the Senate. 37th Cong., 3d sess., S. Misc. Doc., 42.

<sup>2</sup> Rule XIV, March 26, 1806.

<sup>3</sup> Ralston Hayden, *The Senate and Treaties, 1789-1817*, ch. VIII, 'The Committee on Foreign Relations.' The men and their number of committee assignments were: Strong, 9; Morris, 8; King, 7; Ellsworth, 7; Cabot, 4.

<sup>4</sup> Dec. 10, 1816, *Senate Journal*, 38.

<sup>5</sup> The close parallelism in committee development in the two branches of Congress is illustrated by the fact that nine of these committees 'had the same functions as nine committees long before entered upon the House list.' L. G. McConachie, *Congressional Committees*, 254.

expansion of the committee system there promptly developed such opposition that in 1821 Senator Eaton moved that the rules be referred to a select committee with instructions to expunge so much thereof as related to standing committees.<sup>1</sup> This motion, however, was defeated.

## STANDING COMMITTEES

---

### METHODS OF CHOICE

#### *By Election*

In the Senate *Journal* of the first thirty years the record of the passing of a resolution that for a given purpose a select committee be 'made' or 'raised' is commonly followed by the names of its members with no statement of the method of their choice. But in the first Rules of the Senate, adopted April 16, 1789, it had been provided: 'All committees shall be appointed by ballot, and a plurality of votes shall make a choice.'<sup>2</sup>

#### *Appointment by Vice-President or 'Presiding Officer'*

This choice by ballot remained unchanged until 1823. In that year Senator Eaton made the constructive proposal that the chairmen of the five most important committees be chosen by ballot, and that these five men be given power to fill up their own committees and to select the members of all the remaining committees. Although this proposal received consideration, the Senate adopted instead an amendment to the rules providing that all committees 'shall be appointed by the presiding officer of this House, unless otherwise ordered by the Senate.'<sup>3</sup> This ambiguous phrase, 'presiding officer,'

<sup>1</sup> Dec. 11, 1821, *Annals of Congress*, 23.

<sup>2</sup> Rule XV, *Annals of Congress*, I, 21-22. 'As our committees are all chosen by ballot, the influence and weight of a member can be very well measured by the number and importance of those upon which he is placed. In this respect I have no excitements of vanity.' (J. Q. Adams, Jan. 4, 1805, *Memoirs*, I, 329.) See Maclay's suggestion (*Journal*, xiv, Rule XIII), that the presiding officer 'take the sense of the Senate as to the manner of appointing the committee, whether by motion from the Senators, nomination from the Chair, or by ballot.' *Annals of Congress*, 1823-24, 25-26.

<sup>3</sup> A resolution that the Vice-President be empowered to nominate committees, offered Oct. 31, 1791, seems to have been postponed indefinitely, without discussion. *Senate Journal*, 332.



at that time gave no embarrassment, for Vice-President Tompkins is said to have entered the Senate Chamber hardly once during the last three years of his term, and committee appointments therefore devolved upon the President *pro tempore*, John Gaillard, an officer chosen by and responsible to the Senate. But the next Vice-President, Calhoun, taking the Chair contrary to precedent on the opening day of the Nineteenth Congress, assumed this power to himself as 'presiding officer,' and appointed the committees with such obvious bias that the session was only four months old when, with hardly a dissenting vote, the Senate took the appointment of committees away from the President *pro tempore* as well as from the Vice-President, and restored the rule of choice by Senate ballot as it had obtained from 1789 to 1823.<sup>1</sup>

In the same year it was provided that in the appointment of standing committees the Senate should proceed by severally appointing the chairman of each committee, a majority of the whole number of votes given being necessary for his choice, but that they should then vote by one ballot for the other members necessary to complete the committee list.<sup>2</sup> In 1828 the rule was changed to provide for the appointment of Senate committees by the President *pro tempore* — with distinct intent thus to exclude Vice-President Calhoun.<sup>3</sup> In the next few years, in several instances the Senate suspended the rule so far as to authorize the Senate to ballot for the chairman of the committee on which the President *pro tempore* was serving, and then to allow the President *pro tempore* to appoint to all other committee positions.<sup>4</sup> In 1833, an unforeseen contingency arose. Under the rule, as it had stood for the previous five years, the committees would be appointed by Hugh L. White, elected President *pro tempore* at the previous

<sup>1</sup> *Annals of Congress*, 1st sess., 19th Cong., 571-72; McConachie, *op. cit.*, 330; Miss C. H. Kerr, *op. cit.*, 28, n. 2. For a scathing arraignment of Calhoun for 'assuming' this power, and for a detailed illustration of the bias with which he was charged with having exercised it with the purpose of embarrassing the Adams Administration, see pp. 50-55 (ed. of 1827) of *An Argument on the Powers, Duties and Conduct of the Hon. John C. Calhoun, Vice-President of the United States, and President of the Senate*, by 'Patrick Henry.' This pseudonym was employed by Philip Ricard Fendall, said to have been a clerk in the Department of State. His inspiration was popularly attributed to President J. Q. Adams, himself. In summary, he charged: 'On each of four highly important committees, namely, those on Foreign Relations, Finance, Indian Affairs, and the Judiciary, you placed only a single Senator who was not hostile to the Administration.'

<sup>2</sup> Dec. 8, 1826, *Annals of Congress*, 3.

<sup>3</sup> It was provided that if there should be no President *pro tempore*, the appointment should be made by ballot, in accordance with the rule adopted Dec. 8, 1826.

<sup>4</sup> Dec. 7, 1829; Dec. 5, 1838.

session. But the November election had placed his party in the minority in the Senate. Hence the rule of choice of committees by ballot was at once restored.<sup>1</sup> Indeed, from the first month of the Senate's history to the present time (1789 to 1938), with the exception of eight years, the rules have continued to prescribe<sup>2</sup> the choice both of standing committees and of all other committees 'by ballot,' but recent revisions of the rules have always added the significant phrase, 'unless otherwise ordered.'

In the next dozen years the Senators tried a variety of experiments, feeling their way toward a system which would enable them to keep some control of committee appointments while avoiding the abuses of promiscuous balloting, for it had long been clear that tedium and the waste of time were not the worst features of choosing committees by ballot independent of party guidance.<sup>3</sup> The resulting selections were as subject to accident and chance as are some twentieth-century nominations under the direct primary. Senator Bibb declared that he had seen five or six votes elect a committee, the result representing by no means the choice of the majority of the Senate, but being perfectly accidental, decided in some cases by the simple chance that some members were sitting near each other.

Another mischance which frequently arose from the election of committee members by plurality balloting was that the lay member heading the list might prove to be of the party opposed to that of the chairman who had just been elected by majority vote. To remedy this situation, after all committees had been appointed by ballot in compliance with the rule, it was frequently voted that the committee members be 'arranged' in accordance with a schedule presented by the mover, the object being to secure a consistent succession in the headship of the committee in case of the chairman's absence or withdrawal.

To avoid these inconveniences, it became customary by unanimous consent to suspend the rule requiring the ballot and to authorize the appointment of committees by some designated officer. (The Vice-President, the President *pro tempore*, or the 'presiding officer'.)<sup>4</sup> Thus,

<sup>1</sup> Van Buren declared that this change was adopted by a strict party vote, and he imputed it to a desire to embarrass him. *Autobiography*, 675; McConachie, *op. cit.*, 334.

<sup>2</sup> 1823-26; 1828-33.

<sup>3</sup> 'The minority controlled the Finance Committee in 1816, and held the chairmanship of Commerce and Manufactures, while the Military Affairs was chosen entirely from the majority.' McConachie, *op. cit.*, 275.

<sup>4</sup> So perfunctory did this procedure become that the Secretary of the Senate sometimes failed to record the suspension of the rule — if indeed it was actually done. E.g., Dec. 5, 1844, the Chair stated that the standing committees would be announced

in 1837, after four chairmen had been elected, on motion of Henry Clay, of the minority, by unanimous consent it was agreed that the other appointments be made by the President of the Senate.<sup>1</sup> This gave the task to Richard M. Johnson, the only Vice-President who has ever been elected by the Senate. At the beginning of the regular session three months later, the appointment was again placed in his hands. At the brief special session of the Senate in March, 1845, the newly inaugurated Vice-President, George M. Dallas, as presiding officer, named the committees under an injunction of secrecy, soon removed.<sup>2</sup> But when that Congress convened for its first regular session the following December, Benton with three other Democrats joined the Whigs in defeating by a single vote a motion that the committee appointments be made by the President of the Senate, and the Senate proceeded to ballot for the entire list of names, which later had to be 'arranged.'<sup>3</sup> At the next session the same issue was raised, and again the Senate defeated a motion to authorize the appointment of committees by the Vice-President.<sup>4</sup>

Thus, only four times in its history of nearly one hundred and fifty years has the Senate authorized the Vice-President to appoint its list of committees, and in two of these cases the Senate took prompt and specific action to prevent these officers making appointments for the second time. This affords clear evidence of the unwillingness of the Senate to place so great a power in the hands of the officer not responsible to itself.<sup>5</sup>

on Monday, 'in accordance with the usual practice'; and on that day he announced to the Senate the membership of the 27 committees.

<sup>1</sup> Sept. 7 and 8, 1837, *Senate Journal*, pp. 27-28. Dec. 6, *ibid.*, 25 and 27.

<sup>2</sup> March 10, 1845, *ibid.*, 289-90. The appointment was made in executive session.

<sup>3</sup> Dec. 4, 1845, *ibid.*, 36. In supporting his motion 'that so much of the 34th rule as requires the appointment of the several standing committees by ballot, at the present session be suspended; and that appointment be made by the President of the Senate,' Breeze insisted that he did not wish to rescind the rule. 'When... the occupant of the chair entertained opinions which were opposed to the opinions of the majority of the Senate, it was a sufficient reason for the enforcement of this rule. But... now, perfect harmony was existing as regards all questions of public moment, between the Presiding Officer and the majority of the Senate.' He argued for the greater responsibility of the Vice-President to 20,000,000 of the American people than of the President *pro tempore* to 54 delegated Senators, voting by secret ballot. His motion was lost by a vote of 21 to 20. (*Cong. Globe*, XV, 19-21.) Apparently the object of Breeze's motion was to make the complaisant Vice-President 'the mere agent of the majority for presenting its previously arranged slate.' (McConachie, *op. cit.*, 281.)

<sup>4</sup> Dec. 10, 1846, *Senate Journal*, 39.

<sup>5</sup> In 'The Fifth Wheel in our Government' (*Century*, LXXIX, 213), ex-Senator A. J. Beveridge proposed that the Vice-President be given the power to appoint the Senate committees. 'He would at once become a determining factor in government, a



*By Balloting for Party Lists*

In the history of Senate organization few periods have been of more interest and significance than the ten days at the opening of the second session of the twenty-ninth Congress, December 7-17, 1846. The motion to entrust to the Vice-President the appointment of committees was promptly defeated. In accordance with the regular rule, the Senate began balloting for chairmen. After the chairmen of six committees had been elected, there developed a long debate over the method of choosing the other members. Vice-President Dallas advocated the method formerly in vogue by naming lay members of a committee in order, from the one receiving the most to the one receiving the fewest votes. The Democratic leader, Sevier, came forward with motions which arranged the names and safeguarded the majority's succession to chairmanships which might become vacant. After several committees had been filled by this method, by unanimous consent Rule 34 was suspended, and the Senate proceeded to elect upon one ballot a list of candidates for all the remaining vacancies presented by Senators Sevier and Speight.<sup>1</sup> This list gave to each committee thus filled its chairman and the majority of its members from the same party which held a majority in the Senate. From that day to this, the appointment of Senate committees in most cases has been a perfunctory affair: By unanimous consent the portions of the rules requiring election by ballot and separate majority choice of chairmen have been suspended and the election has taken place by yea-and-nay vote upon the resolution for the adoption of a list which has usually been mutually agreed upon by representatives of the caucus or conference of each of the two parties.

## THE SIZE OF STANDING COMMITTEES

In the early years of the Senate its select committees were almost invariably of three members, and its first standing committees were of

working bee making honey every day, instead of a queen bee with nothing to do.' But the Senate has had opportunity to consider this proposal during 140 years, and the above record shows how acceptable it would prove. How greatly would it have conduced to the effective carrying-on of the Senate's work if the committees in Senates controlled by Republicans had been appointed by Democratic Vice-Presidents in the last Congresses of the Cleveland and Wilson administrations?

<sup>1</sup> Dec. 14, 1846, in the annual choice of committees six chairmen had been elected when Mr. Sevier observed 'that he had a list of the committees which had been agreed upon not only on his side of the Chamber, but upon the other also, which might be read and adopted by common consent.' After it had been read, on motion of the minority leader it was agreed that 'the list of committees just read be the standing committees of the Senate.' For compliance with this precedent at the opening of the next two Congresses, see *Cong. Globe*, 19, Dec. 13, 1847, and 39, Dec. 18, 1849.

that number. When a new standing committee was created, its membership was specified: the eleven new committees created in 1816 were each to be of five members. Two years later the revision of the rules prescribed five as the size of all standing committees except those on Engrossed Bills and Audit and Control of the Contingent Expenses of the Senate, the membership of which was still kept at three. In the middle of the century seven became the common number; in the years from 1885 to 1900 most of the new committees were of nine members. At times when the rules have undergone general revision, some attempt has been made to secure greater uniformity as between similar committees, but there are always tendencies at work to produce differences. The nature and extent of each committee's task determine in some measure the size of committee by which it can be most effectively performed. There is always strong pressure from ambitious Senators for places on the committee whose work gives greatest opportunity for making a reputation.<sup>1</sup> The shifting of party strength or the advent of a new party group may call for a readjustment most easily met by enlargement of the committees with little regard to its effect upon their efficiency.<sup>2</sup>

The Senate committees in 1937 ranged from three members (Enrolled Bills) to twenty-four (Appropriations). Ten others are of eighteen or more members. The average membership is fourteen. The House committees ranged from two (Disposition of Useless Executive Papers) to thirty-nine (Appropriations). Their average membership is nineteen, for, although the number of House committees is larger by half than that of those in the Senate, there are four and a half times as many Representatives to be distributed among them. Nearly three-quarters of the forty-seven House committees have a membership of twenty or over. Of the directly analogous committees in the two branches, most of those in the House naturally are considerably larger; but in two committees authorized to act as joint committees the ratio is reversed: Library (Senate, ten; House, five); Printing (Senate,

<sup>1</sup> It was newspaper gossip that when McNary became Chairman of the Republican Committee on Committees, and 'took account of stock,' he found that on the Committee on Foreign Relations there were to be two vacancies, and that there were fourteen applications for these two openings. It was queried whether the wives and daughters of Senators and Representatives were not largely responsible for the 'urge' for diplomatic committee assignments. In both the Senate and the House, Naval Affairs and Military Affairs seem to come next in order of preference from a society point of view.

<sup>2</sup> Thus, in the organizing of the Senate in the 68th Congress additional places were provided for the members of the Farmer-Labor Party upon several of the committees to which they were assigned.

seven; House, three). In both branches of Congress two committees have been greatly enlarged: the Committee on Rules, which for many years had a membership of three in the Senate and five in the House, now has thirteen in the Senate and fourteen in the House; and the Committee on Irrigation and Reclamation now has seventeen in the Senate and twenty-one in the House. In this particular instance it is to be observed that a far larger proportion of Senators than of Representatives would naturally come from states eager for irrigation and reclamation projects.

#### A SENATOR'S COMMITTEE QUOTA

The contrast between the two branches in the number of committee assignments for each member is even more striking than the relative size of the two bodies would suggest:

MEMBERS' ASSIGNMENTS TO COMMITTEES, 1923-24; 1935-36

BRANCH	NUMBER OF COMMITTEES								
	0	1	2	3	4	5	6	7	8
Senate									
1923	0	0	1	11	42	37	5	0	0
1935	0	0	0	8	36	29	20	3	0
House									
1923	2	253	39	72	49	14	6	0	0
1935	3	215	42	119	52	1	0	2	1

In 1924 not a single Senator served on but one committee, and only one, the venerable Chairman of the Committee on Foreign Relations, was assigned to but two. In the House, on the other hand, the Speaker and the majority leader were assigned to no committees;<sup>1</sup> two hundred and fifty-three served on but one committee, and two out of three Representatives served on not more than two committees.

In 1935 the average quota for a Senator was five; for a Representative, two. Ten out of eleven Senators served on four or more committees; in the House the proportion of those serving on four or more is but little higher than one out of eight. In the Senate the chairmen of the ten major committees are members of from one to five

<sup>1</sup> Senator Lodge; Speaker Gillett and Congressman Longworth. March 5, 1857, Butler asked to be excused from serving on any Senate committee on the ground that after eleven years of service he 'had a right to ask leave to go on the retired list.' The motion to excuse him was not agreed to. *Cong. Globe*, Appendix, 383.



other committees. In the House, a chairman of a major committee is rarely burdened with any other committee service. Members of the House query whether not a little delay of business in the Senate is not due to this overburdening of chairmen and to the large number of committees on which each Senator serves, which makes it far harder to hold the personnel of a given committee to the steady carrying forward of its own work.<sup>1</sup>

#### THE NUMBER OF SENATE STANDING COMMITTEES

It has been suggested that the country's history might be found epitomized in the names of congressional standing committees arranged in the order of their establishment, but that to make the story complete, the select committees of more than threescore Congresses 'must also be marshalled in review, for they will recall passing events which have stirred the nation for a moment, and then passed into the category of the forgotten.'<sup>2</sup>

Such an epitome would be more trustworthy if drawn, as Doctor McConachie intended, from the list of House committees than from

<sup>1</sup> In the 66th Congress one Senator, who spent much of his time campaigning for a presidential nomination, was a member of nine standing committees, including two of the major ones.

The above table does not adequately show the excess of the Senator's burden of committee service as compared with that of the Representative, for it takes account only of membership on standing committees, and not the assignments to special investigating committees, for which the Senate is displaying a rapidly increasing penchant. Even with the limitation by the unwritten rule that no Senator shall serve on more than two major committees, proper attention to committee duties compels many Senators to absent themselves from the floor while the Senate is in session. 'This admittedly requires correction, but . . . Senators are reluctant to yield the power which comes from membership on committees.' (Senator J. T. Robinson.) The resolution calling for the amendment of the Rules so as to prevent a Senator from serving on more than two major committees was reported back favorably from the Committee on Rules, Feb. 19, 1919, by Cummins, who urged that it be put upon its passage, declaring that there would be no debate. (*Cong. Rec.*, 3744-4556.) But Overman, Chairman of the Committee on Rules, though declaring that he himself had favored the resolution, at the request of another Senator who was absent objected to its consideration, and it has never secured a vote on its adoption. It remains, therefore, an unwritten rule, 'to be regarded or disregarded as the powers that be may prefer.' So Senator Norris, its author, described it to the writer.

In the House in 1935 neither the majority nor the minority leader held any committee assignment. In the Senate, on the other hand, the majority leader was a member of three important committees (Foreign Relations, Rules, and Territories), while the minority leader was a member of five.

In an autobiographical article by Vice-President Garner, a year after he had shifted from the Chair of Speaker of the House to that of President of the Senate, his only recommendation was that the membership of Senate committees be reduced, in order to enable members to concentrate on less work. It would not then be necessary for one Senator to be a member of four or five committees, two or three of which might be meeting at the same time. (Cited in *Washington Post*, June 20, 1934.)

<sup>2</sup> L. G. McConachie, *op. cit.*, 40.

those of the Senate. For the establishment of Senate standing committees has often lagged far behind the occasion which had brought such action in the House. Thus, the Louisiana Purchase in 1803 promptly led to the creation, in 1805, of the House Committee on Public Lands, but the Senate first made provision for such a committee more than ten years later. The Senate's list, however, affords some illustrations of more prompt response. The committees on the Pacific Railroad (1863) and Mines and Mining (1865) came coincidentally with the construction of the Pacific Railroad and the opening of the bonanza silver mines; the Committee on Privileges and Elections (1871) came when needed to handle the great number of contested elections in the turmoil of Reconstruction; and the Spanish-American War promptly brought committees on Interoceanic Canals, Pacific Islands and Porto Rico, the Philippines, and relations with Cuba — all created in 1900.

Sometimes committees have been created and at once filled without any general revision of the list. Often at the opening of a Congress many changes both in the number of standing committees and the size of individual committees have been made simply by the unchallenged acceptance of the list presented by the majority leader. In not a few cases the suspension of the rule requiring balloting was omitted, the passing of the motion to adopt the list 'by unanimous consent' being apparently accepted as importing the necessary suspension.

Committees come and go. Thus, the Committee on Commerce and Manufactures, established in 1816, was split in 1825 by the establishment of a separate Committee on Manufactures; but this was dropped from the list in 1857, only to be restored in 1864. 'Retrenchment' has been a favorite word in committee names. A Committee on Retrenchment created in 1842 was dropped in 1857. In 1871 there was created a timely Committee on Investigation and Retrenchment, which two years later gave place to a Committee on Civil Service and Retrenchment, a name which remained on the list till 1921, though concern over retrenchment seemed long since to have disappeared from Senate deliberations. Unsuspected motives have at times brought new committees onto the list.<sup>1</sup>

<sup>1</sup> Thus, in 1900 the Navy Department seemed to be trying to take over the Coast and Geodetic Survey, a disposition not at all approved by those engaged in that service. A resourceful secretary of one of the Senators suggested that a new Standing Committee on Coast and Insular Survey be formed. Neither the *Senate Journal* nor the *Congressional Record* gives any indication that the proposal had had previous discussion. The committee list, submitted by Senator Aldrich Dec. 15, 1899, included a

Some standing committees have shown astonishing longevity. Thus a Committee on Revolutionary Claims, whose creation in 1832 seemed strangely tardy, held its place on the list till 1921, it may well be half a century after the last 'Revolutionary Claim' was referred to it for consideration. Certain select committees, too, have proved to be hardy perennials. The Committee on Claims of American Citizens against Nicaragua, created in 1879, remained on the list till 1895. Select committees have shown a strong tendency to develop into standing committees. In 1884 the adoption of the revised Rules made five such promotions without a word of debate. In 1896, Senator Aldrich sponsored three such transplantings, and March 22, 1909, not only were nine new standing committees created, but on that same day Senator Aldrich sponsored dumping into the list of standing committees the whole motley array of select committees then remaining.<sup>1</sup> The creation of three more, March 15, 1913, brought the number of standing committees up to its maximum. To recapitulate: In its first quarter of a century the Senate created only four standing committees; in 1816 it added eleven; by 1863 the number had grown to nineteen; in 1889, at the end of the first century, it stood at forty-two; by 1913, with the wholesale additions above described, it had risen to seventy-three. Eight years later, at a single stroke the list was cut down to thirty-four.

As early as 1886 there had been appointed a select committee on Reduction of Senate Employees and Committees. The fantastic list, retaining for example a Committee on Revolutionary Claims more than one hundred years after the end of the Revolutionary War, and the absurd additions in 1909, had often been the subject of sarcastic editorial comment and of facetious remark in Senate debate. But

Committee on Coast and Insular Survey, of nine members, several exceptionally influential Senators having consented to the placing of their names on that committee. By unanimous consent, without a word of explanation or debate, the new committee became a part of the system. That committee never made a report; it may never have held a meeting; but its name and personnel proved an effective defense of the Coast and Geodetic Survey from aggression on the part of the Navy Department. The above account of this episode is vouched for to the writer by the man who made the original suggestion.

<sup>1</sup> Additional Accommodations for the Library of Congress; Disposition of Useless Papers in the Executive Departments; Five Civilized Tribes of Indians; Investigate Trespassers upon Indian Lands; Industrial Expositions; Standards of Weights and Measures; Transportation and Sale of Meat Products; Woman Suffrage. Aldrich submitted and asked for the adoption of the following 'privileged resolution.' 'That the following shall constitute the standing committees of the Senate of the Sixty-First Congress.' The record reads: 'The resolution was read, considered by unanimous consent, and agreed to.' There is no indication of a request for suspension of the rules, or that attention was called to the enlargement of the list. *Cong. Rec.*, 120.



there were considerations which made Senators of whatever party tolerant of the survival of these hoary anachronisms. In 1884 when a revision of the rules had been reported which dropped from the list the Committee on Revolutionary Claims, it was reinserted on the ground that this particular committee 'has always been assigned to the minority of the Senate. The committee room is a large room, and is a very convenient place for Senators of the minority to assemble'; and it was thought better to have this minority meeting-place available by the courtesy of the chairman of that committee rather than by the passing of a resolution at the beginning of each session.<sup>1</sup> In that same debate Senator Vest declared:

I undertake to say that there are six of the standing committees of the Senate that have never had a bill, or a resolution or a particle of business before them within the memory of a living man that I know of. They are all sinecure committees. They were created simply to give secretaries to members of the Senate and a committee room.<sup>2</sup>

A year later Senator Frye, of the opposite party, stated the case even more strongly:

There are a dozen or sixteen committees of the Senate that can be dispensed with just as well as not, and if each Senator has a clerk, the necessity for those committees, if ever there was any, ceases with the employment of that clerk.<sup>3</sup>

Yet more than thirty new standing committees were to be added to this padded list — including the creation in 1893 of a Senate standing committee of nine members on Indian Depredations! — before the pruning knife was to be applied, and 1921 still found Senators of the foremost rank manning such committees as those on Revolutionary Claims and the Disposition of Useless Papers in the Executive Departments.<sup>4</sup>

A place upon a select committee brought with it, not only to the chairman but to the lay member of the committee, a welcome publicity and an eking-out of the stationery allowance. The chairmanship of a standing committee brought generous and efficient stenographic

<sup>1</sup> Jan. 1, 1884. Anthony and Cameron, *Cong. Rec.*, 232.

<sup>2</sup> *Cong. Rec.*, 308.

<sup>3</sup> March 31, 1885.

<sup>4</sup> Revolutionary Claims: Sheppard, Chairman, Harrison, Lodge, Kellogg, Lenroot. Disposition of Useless Papers: Walsh, T. J., Chairman, Glass, France, Warren, McCumber. In 1917 the Committee on Transportation Routes to the Seaboard — which was said not to have had a meeting in thirty-eight years — numbered in its membership Senators of the grade of McCumber, Lodge, Sheppard, and Martin. In 1907, the Republicans took 61 chairmanships, and assigned 10 to the minority, several committees being created for the purpose of providing chairmanships.

service, years before such facilities were provided for individual Senators. It is said that a chairman once explained to his committee, astonished at having been called together near the end of the Congress for their first meeting, that he had found it necessary to convene the committee in order that, by reporting that a meeting had been held, his secretary might qualify for seven hundred dollars of additional compensation as 'Clerk of the — Committee.'<sup>1</sup> In complacent apology for the long list of 'shadow' committees, Senator Hoar emphasized the Senate's friendly disposition to provide certain distinguished members of the minority, who had grown old in the service, with comfortable office accommodations near the Senate Chamber, as otherwise they would be subjected to great inconvenience when not in actual attendance in the Chamber.<sup>2</sup> With the more generous supplying of the individual Senator with clerical service and with the opening of the palatial Senate Office Building in which each member may have an ample suite of rooms with handsome furnishings and equipment, the excuse for keeping dozens of the standing committees in a state of suspended animation disappeared, and in 1921 the list was cut from seventy-three to thirty-four.<sup>3</sup> Of the survivors each seems to have in itself its *raison d'être*.

## PARTY CONTROL OF THE SENATE COMMITTEE SYSTEM

---

### EXTENT OF PARTY CONTROL

To a stranger, intent upon comprehending our Government, a diligent reading of the latest edition of the Senate Rules as to Standing Committees would give little light upon the actual control of the committee system — which is, in effect, the control of all the most

<sup>1</sup> McConachie, *op. cit.*, 171. This was a House committee, but the author adds: 'Of the two branches the Senate has gone much farther in this extravagance.'

<sup>2</sup> Hoar referred to his minority chairmanship of the Committee on Woman Suffrage, 1893-95, as 'a lodge in the wilderness.' Though an earnest advocate of woman suffrage, he considered it 'hardly worth while to take the trouble of plying Congress with petitions or arguments.' *Autobiography*, II, 100. (1903.)

<sup>3</sup> Page 285. By vote of Feb. 17, 1909, the jurisdiction of the Senate Committee on Rules was extended to include the Senate Office Building as well as the Senate Wing of the Capitol — including the arrangements of rooms for the Senators' use.

important activities — of the United States Senate. He would get much closer to actualities in the following statement, from a speech delivered in the Senate in 1908 by Senator La Follette:

I attended a caucus at the beginning of this Congress. I happened to look at my watch when we went into that caucus. We were in session three minutes and a half. Do you know what happened? Well, I will tell you. A motion was made that somebody preside. Then a motion was made that whoever presided should appoint a committee on committees; and a motion was then made that we adjourn. Nobody said anything but the Senator who made the motion. Then and there the fate of all the legislation of this session was decided. . . . Mr. President, if you will scan the committees of this Senate, you will find that a little handful of men are in domination and control of the great legislative committees of this body, and that they are a very limited number.<sup>1</sup>

From the first suspension of the rules in 1846 by unanimous consent as a preliminary to a vote upon the list of committee nominees submitted by party leaders,<sup>2</sup> this control by the caucus or its agents has continued and developed until hardly any phase of the committee system has escaped its determination. When either party holds a strong majority in the Senate, this oligarchic control is practically unchallenged. How perfunctory this procedure may become is illustrated by the action taken December 2, 1867, when the Republican leader, Anthony, made *seriatim* the following motions:

I move that the Senate now proceed to the election of the standing committees of the body. [This motion was agreed to.]

I ask the unanimous consent of the Senate that the rule which requires the committees to be elected by ballot be dispensed with. [No objection being made, the rule was dispensed with.]

I send a list of committees to the desk, which I nominate. [The clerk read the entire list.]

The President *pro tempore*: The question is on the adoption of the list of committees which has been read. [The list was adopted.]

In 1921, as has been stated above, a much-needed reduction in the number of standing committees was effected. The method of this change was not less significant than the act. Senator Brandegee, who

<sup>1</sup> P. S. Reinsch, *Readings on American Federal Government*, 168.

<sup>2</sup> Page 277. Dec. 14, 1846, *Cong. Globe*, 30. Until the Civil War the motion for suspension of the rule was made by the minority leader evidencing its agreement in this procedure. Since that time the majority leader has usually made the motion. March 9, 1925, the Chairman of the majority's Committee on Committees said: 'Hitherto the leader of the majority has always offered both lists, but out of deference to my friend from Arkansas [the minority leader], I have asked him to present the Democratic list.' *Cong. Rec.* 41.



was Chairman of the Republican conference's Committee on Committees, April 12, 1921, introduced in the Senate a resolution for a revised list of committees, explaining that the object of the changes was to increase the size of some of the major committees and to place upon them some of the younger men. This was referred to the Committee on Rules. The following day, however, he submitted a new resolution:

*Resolved*, that Rule 25 of the Standing Rules of the Senate be, and it is hereby amended, so as to read as follows:

First, the following standing committees shall be appointed at the commencement of each Congress, with leave to report by bill or otherwise.<sup>1</sup>

The size of each committee was designated in the resolution.

In explaining his action Brandegee said in the Senate:

The entire Republican membership of the Senate met in conference yesterday and accepted the list of committees made up by the Republican conference's Committee on Committees, proceeding upon the theory that the rule would be changed so that there would be ten Republicans and six Democrats on each of the major committees, and then instructed me to introduce a resolution to so change the rule.<sup>2</sup>

The motion to commit was defeated by vote of 26 to 45. April 18, the Brandegee resolution, somewhat amended, was adopted by vote of 45 to 25. Immediately, the Republican leader, Senator Lodge, moved that so much of Rule 24 as provided for the appointment of standing committees by ballot be suspended. By unanimous consent it was so ordered, and he at once obtained immediate consideration for a resolution, 'That the following shall constitute the standing committees of the Senate of the sixty-seventh Congress,' sending to the desk a full schedule of names to fill the thirty-four committees provided for by the order just passed.<sup>3</sup> In this drastic fashion were forced through the Senate the most revolutionary changes in the

<sup>1</sup> April 13, 1921, *Cong. Rec.*, 133-34.

<sup>2</sup> Many Senators took part in the discussion, the Democrats protesting vigorously against the attempt to pass this resolution through the Senate, while the one of the day before, identical with it in practically every particular, was still before the Committee on Rules. Hence Underwood's motion to commit this second resolution to the same committee. (*Cong. Rec.*, 402-03.) Said Brandegee: 'Criticisms are purely professional. The Republicans are responsible to the country for legislation and must have control of committees. That's not tyranny; that's representative government — the rule of the majority. The steam roller is about to start.' 'Steam rollerism defiles the lips of a senator,' said Mr. Reed (Mo.). 'It means abuse of power, denials of rights.' The reorganization gave the Republicans an extra place on each of the ten major committees. (Dispatch of April 13 to *Boston Herald*.)

<sup>3</sup> *Cong. Rec.*, 404-05.

century since standing committees had been introduced. With a few trifling amendments of detail, the program was carried through precisely as it had been initiated by the Republican Committee on Committees, a small party group bearing no responsibility to the Senate, and the personnel of which was nowhere of public record.<sup>1</sup>

In the vast majority of cases Senate action upon a pending bill or resolution follows the recommendation of the committee to which it has been referred. But both the personnel and party representation upon those standing committees are usually settled in the majority caucus. Things run smoothly when one party holds control of the Senate by a majority that is safe but not so large as to induce carelessness. When, however, the majority party is split into factions, or when new parties or 'blocs' are trying to secure recognition, it may prove impossible to confine the wrangling to the secret caucus room, and the party schedule of committee appointments may reveal such evidence of weakness and dissension as to lead to defiance and defeat on the floor of the Senate.

#### EARLY EXAMPLES OF CAUCUS CONTROL

The caucus method of choosing committees had been in use but two or three times when Free-Soilers began to throw the party machinery out of gear. John P. Hale refused to align himself with either the Democrats or Whigs, and declined to accept the committee assignments offered to him.<sup>2</sup> Accordingly he was left without committee place in three successive sessions. In the next Congress, insisting that Salmon P. Chase and he constituted a third-party or-

#### <sup>1</sup> COMMITTEE LIST AND MEMBERSHIP

	1921	1937		1921	1937
Agriculture and Forestry	16	19	Irrigation and Reclamation	11	17
Appropriations	16	24	Judiciary	16	18
Audit and Control	5	4	Library	7	10
Banking and Currency	15	20	Manufactures	11	13
Civil Service	11	10	Military Affairs	16	17
Claims	13	13	Mines and Mining	9	13
Commerce	16	20	Naval Affairs	16	17
District of Columbia	13	15	Patents	7	7
Education and Labor	11	13	Pensions	11	10
Enrolled Bills	3	3	Post Offices and Post Roads	16	19
Expenditures in Executive Departments	7	7	Printing	7	7
Finance	16	21	Privileges and Elections	13	17
Foreign Relations	16	23	Public Buildings and Grounds	13	14
Immigration	11	14	Public Lands and Surveys	13	15
Indian Affairs	11	14	Rules	12	13
Interoceanic Canals	16	8	Territories and Insular Possessions	13	17
Interstate Commerce	11	20	Revision of the Laws	3	0

<sup>2</sup> McConachie, *op. cit.*, 284-85.

ganization which had not been consulted in the making-up of the committee lists, he broke unanimous consent to the suspension of the rule and forced balloting. After one day's start had been made on the election of chairmen, Hale and Chase yielded to the extent of allowing by mutual agreement the election of the list of committee assignments except those three which might have greatest influence on the Free-Soil issue — Judiciary, Territories, and District of Columbia. On each of these they forced choice by ballot.<sup>1</sup> In 1853, Chase was assigned to three non-political committees by the Democrats. Unwilling to give any recognition to Sumner, the Whigs left vacancies at the end of the Committees on Pensions and Enrolled Bills, and the Democrats there inserted Sumner's name.<sup>2</sup> In 1855, Hale once more forced balloting on committee appointments.<sup>3</sup> With the collapse of the Whigs and the growing strength of the Republicans in the later fifties, some share was given to the leaders of the new party in naming Republicans for committees. While not forcing balloting, they did repeatedly demand yea-and-nay votes on the adoption of the committee list and made vigorous protest at the inadequate representation allowed them. In 1859, the Republicans pointed their protest by refusing to name their own committee representatives.<sup>4</sup>

During the war years, 1861–65, while the seats of Southern Senators were vacant, all the committee assignments were brought in by the Republican conference committee, its leaders assuring the protesting

<sup>1</sup> McConachie, *op. cit.*, 285.

<sup>2</sup> McConachie (*op. cit.*) cites the *New York Tribune*, Dec. 13, 14, 1853.

<sup>3</sup> There was some bantering, in the session of Dec. 13, 1855:

Hale: The Chair will recollect that a few years ago the state of my political health was such that I was not fit to go on any committee.

Cass: You have improved since then. (Laughter.)

Hale: Yes, sir. I think it indicates progress: it shows that I am so improved that I am fit to be at the tail end of the Committee on Public Buildings.

The same day there was insistence that the *Journal* be corrected so that the names of committee members would be there listed as they had been on the paper which had been handed in by Cass, for the majority, whose wish was that one of their own choice should succeed as chairman, in case of his absence, death or resignation. After forcing this avowal from Cass, Hale said:

All I want is that it shall appear in record that this thing was arranged by a Democratic caucus, that the committees were fixed there, and now the motion is that we register the decrees of the caucus.

Mr. Cass and Mr. Willis: That is it exactly. (Laughter.)

(*Cong. Globe*, 22–23.)

<sup>4</sup> McConachie, *op. cit.*, cites Lyman Trumbull's complaint that, though the Republicans constituted a third of the Senate, they were given no representation at all on some committees, and but one member out of seven on others. *Cong. Globe*, 384. *New York Tribune*, Dec. 19, 20, 1859.



Democrats that, though not consulted, they were receiving generous recognition.<sup>1</sup> To the Democrats' complaint in 1871, John Sherman's statement went uncontradicted that at that session they were receiving their exact quota, and that the Republicans had not changed a single assignment which had been submitted by the minority.<sup>2</sup> At the next session, however, the Democrats forced balloting for committee appointments.

When an evenly balanced Senate convened in 1881, the death of one Republican, the withdrawal of three others to enter the Garfield Cabinet, and the independent attitude of David Davis and of the Virginia 'Readjuster,' Mahone, led the Democrats to try to force through a committee list in the preparation of which the Republicans had had no share. The Republicans started a filibuster, threatening to keep it up till the committee vacancies were filled. In this muddle, the Vice-President's casting vote, Mahone's help, and Davis's bargaining for the position of President *pro tempore*, enabled the Republicans to wrest the organization of the committees from the Democrats; but after Arthur's accession to the Presidency deprived the Republicans of the casting vote, all that they 'dared to do for two years was to move for the revival and continuance of old lists, with filling of vacancies by Mr. Davis who had been chosen President *pro tempore*.'<sup>3</sup>

In the middle nineties the Republicans were reduced to a plurality control by the incoming of Populist and Free-Silver Senators. In conference a proposal that the Republicans join with the Democrats in ignoring the newcomers was defeated, and to secure the essential unanimous consent, substantial concessions had to be made to the representatives of these new groups.<sup>4</sup> Factions or sectional groups, still professing to be loyal to the national party, have sometimes tried by organized pressure to get recognition in the committee assignments. In 1905, the Republicans of the Far West, after a preliminary conference of their own, came into the general conference pledged to stand together and demanding the election of the Committee on Committees by ballot, but were appeased by an agreement that committee assignments made by the chairman should be subject to confirmation by the conference.<sup>5</sup>

<sup>1</sup> McConachie, *op. cit.*, 287.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 288. See p. 236 in discussion of the Vice-President's casting vote.

<sup>4</sup> *Ibid.*, 289.

<sup>5</sup> *Ibid.*, 340.

## RECENT DEVELOPMENTS OF CAUCUS CONTROL

When the Democrats secured control of the Senate in 1913 at their caucus, Senator Kern, who had been chosen chairman and majority leader, after a long conference with President Wilson, presented the names of nine members of the Steering Committee, who were to make up the list of Democratic committee assignments. The names were considered representative of the Progressive Democratic element in the Senate and were unanimously approved.<sup>1</sup> Their committee list was later presented to the Democratic caucus for ratification. To Senator Lodge, who had been chosen minority leader, was entrusted the preparation of the list for Republican membership on the committees. The composite list was promptly agreed to by the Senate.

Regaining control of the Senate in 1919 with the narrowest margin, the Republicans undertook the task of reorganization, insisting on maintaining a majority of three Republicans on the Finance, Interstate Commerce, Foreign Relations, and Elections Committees. The Democrats sought to reduce this majority to two, but the proposal was defeated. Said Senator Lodge:

We feel that the makeup of your committees is your business and your responsibility, and that the makeup of our committees is our business and our responsibility. That is the ordinary rule of courtesy and good manners which I have never before seen violated in the Senate.<sup>2</sup>

He then offered the order, 'That the chairmen and majority members of the standing committees of the Senate be the following Senators' — naming the Senators on the Republican conference list. This order was adopted. The minority leader at once submitted an order that the Democratic members be those mentioned upon their caucus list, and this was agreed to.

<sup>1</sup> *Boston Herald*, March 6, 1913, press dispatch.

<sup>2</sup> May 28, 1919, *Cong. Rec.*, 314-21. *Boston Herald*, May 24, 1919. The Republican Committee on Committees, in compliance with requests from the Democratic conference, did agree to reduce to two members the Republican majority on other committees. In the Senate session of May 28, the Republican leader, Lodge, introduced a resolution that the Senate proceed to choose the chairmen and the majority members of the Senate standing committees, and that they be the men named on the list which he presented. The Democratic leader, Hitchcock, insisted that they could not be thus chosen — that the rule must first be changed, which required election of chairmen by majority vote, while the others might be elected by plurality. Lodge maintained that his proposition was covered by the clause, 'unless the Senate otherwise order.' The Democrats emphasized that the Republican majority was very small and uncertain — two including Newberry, who later resigned, but whose presence in the Senate at this critical juncture is alleged to have given its organization to the Republicans (p. 142). Hitchcock's substitute motion that the Senate proceed to choose by ballot the chairmen of the Senate committees, was lost by a vote of 48 to 45, three not voting. The question of recognizing pairs on these votes as to organization was discussed. *Cong. Rec.*, 318.

In 1923, two new Senators from Minnesota elected as Farmer-Labor members, accepted positions assigned them by the Republican majority leader. Committees were enlarged so that recognition might be given to these members of a new political group without cutting down the agreed-upon strength of the two old parties upon these committees, and the minority succeeded in securing increased representation on the major committees. When the Republican conference met in 1924 in anticipation of the opening of the second session of the Sixty-Eighth Congress, it not only approved the selections made by its Committee on Committees for filling the three vacancies in important chairmanships caused by death since the previous session,<sup>1</sup> and the other consequent changes in committee assignments, but it adopted a resolution that Senators La Follette, Ladd, Brookhart, and Frazier — who, though holding Senate committee assignments as Republicans, had actively campaigned against the Republican nominees in the recent election — ‘be not invited to future Republican conferences, and be not named to fill any Republican vacancies on Senate Committees.’<sup>2</sup> But these four men were allowed to retain the committee assignments which they then held.<sup>3</sup>

Shortly before the convening of the Senate of the Sixty-Ninth Congress, the Republican Committee on Committees, having decided that the ‘insurgents’ (‘La Folletteites’) should be demoted, addressed letters to them asking if they wished the assignments to be made by Republicans or Democrats. In reply, Senator Ladd asked that, when effort was made to deprive insurgents of their committee ranks, it be remembered that they had been duly elected as Republicans, and held certificates as such. He added: ‘My first vote was cast for the Republican ticket, and since then I have always affiliated with the Republican Party.’<sup>4</sup> But the majority persisted in taking more interest in how his last vote had been cast. When the Republican

<sup>1</sup> Lodge, Foreign Relations; Brandegee, Judiciary; Colt, Immigration.

<sup>2</sup> Nov. 28, 1925. Though heartily approved by Senator Butler (Chairman of the Republican National Committee and in intimate contact with the President), the action was strongly opposed by Borah and Norris (who had absented themselves from the conference), on the ground that it would imperil Republican success in the states from which the disciplined Senators came. Dec. 3, the four insurgents were barred from a Republican conference in the Capitol.

<sup>3</sup> They were, however, in many instances, placed at the foot of the list, thus losing whatever chance of advancement they might have gained through previous service on those committees. In the Senate reorganization two years later they were recognized as Republicans.

<sup>4</sup> *Boston Herald* dispatch, Feb. 26, 1925.



organization brought before the Senate its slate for the reorganization of the committees, immediate consideration was blocked by members of their own party. When later the Chairman of the Republican Committee on Committees sought a unanimous agreement for a vote to approve the committee appointments of Republicans and Democrats, it was a Republican who insisted upon a test vote on the issue of demoting an insurgent from his chairmanship. There ensued a long and angry debate, in which the requirements of party loyalty were freely discussed.<sup>1</sup> For the first time in two years the Republicans had a working majority. The Democrats, accordingly, chose to keep out of this 'family dispute,' and when it came to the vote on the motion to elect a Republican 'regular' as Chairman of the Committee on Public Lands and Surveys in place of Ladd, who had been its head at the end of the 'oil' investigations in the previous Congress, the minority leader sought and received unanimous consent that all members of the minority might be permitted to refrain from voting, or to vote 'present.' The 'regular' (Stanfield, Oregon) was elected, receiving 36 votes to 13 cast for Ladd, and 3 for a Democrat — 26 voting 'present.' Nearly all of the Democrats then joined with the Republicans in voting for the motion to adopt the list of chairmanships and of committee assignments of all parties, which was passed by a vote of 65 to 11.<sup>2</sup>

In placing newly elected Senators, the party's Committee on Committees or its chairman is likely to give less consideration to the individual's experience, aptitudes, or preferences than to the problem of securing upon the several committees the desired balance of representation as regards geographical sections of the country and the diverse elements of the party, with a view to promoting harmony within the party and to increasing its power in the Senate.<sup>3</sup> Sometimes an assignment may be made with the distinct intention of 'calming' a member. Entering the Senate in 1905, La Follette, whose handling of railroad problems in Wisconsin had made for him a na-

<sup>1</sup> *Cong. Rec.*, 14-17, March 1, 1925.

<sup>2</sup> *Ibid.*, March 9, 1925. A few days later, in Republican conference a proposal to reduce these four insurgents' allowances for personal appointments to fill positions in and around the Capitol was defeated on the ground that they had been sufficiently disciplined by the party (March 12). For other demotions of chairmen, see pp. 301 ff.

<sup>3</sup> When placed upon the Committee on Enrolled Bills, John Quincy Adams asked to be excused, and his request was granted. 'My motive for declining was not the labor, but because I thought the object of those who voted for me was to make my absence from the Senate absolutely necessary, and thus to get rid of a troublesome member. In this project I did not wish to gratify them.' *Memoirs*, I, 369, March, 1805.

tional reputation, was asked his preference as to committees. He suggested first the Committee on Interstate Commerce; but in the twenty years of his service in the Senate he was never placed upon that committee.<sup>1</sup> Many a new Senator feels aggrieved at the scant recognition given to his talents or previous experience. In 1925, Gillett entered the Senate with a record of congressional service rarely excelled and a prestige second to none in the entire Congress; for thirty-two years he had served continuously and effectively as a member of the House — for the last six years as its Speaker, standing in prestige and precedence next to the Vice-President. At the behest of the party, with keen personal regret he gave up this congenial post to enter a doubtful contest for a seat in the Senate. Yet his well-known preference for an assignment to the Committee on Foreign Relations was ignored; that coveted position was given to his Massachusetts colleague, Butler, a Senator by appointment to fill a vacancy, who entered the Senate with no previous experience in Congress, but who had been President Coolidge's intimate friend and campaign manager and still retained the chairmanship of the Republican National Committee.<sup>2</sup>

The filling of vacancies in the standing committees is usually in

<sup>1</sup> In the words of one of his ardent adherents: 'No man in the Senate equaled him in knowledge of the subject. Instead he was made Chairman of the Committee to Investigate the Condition of the Potomac River Front — a committee that in the whole history of Congress never had a meeting. This chairmanship carried with it an office in the subcellar of the Capitol Building.' This statement is biased; for at the same time he was given places on the following committees: Census, Civil Service and Retrenchment, Claims, Immigration, Indian Affairs and Pensions — a strong list for a beginner.

<sup>2</sup> In the 68th Congress these two Senators' assignments were: Gillett: Education and Labor; Enrolled Bills; Judiciary; and Library. Butler: Foreign Relations; Naval Affairs; Patents; and Territories and Insular Possessions. In the next Congress Gillett was placed at the foot of the Republican list on the *Committee on Foreign Relations*. When Elihu Root entered the Senate in 1909, it was recognized that as a former Secretary of State and Secretary of War, he must be placed upon the Committees on Foreign Relations and on Military Affairs. His pre-eminence as a jurist admirably qualified him for a place on the Judiciary Committee, but (said press comment): 'These places are aspired to by Senators of long service, and their claims will be granted.' (Jan. 13, 1909.)

Technically, Butler had a prior claim to this committee assignment on the score of 'seniority.' A week after Gillett had been elected, Butler became a Senator by appointment, to fill the vacancy caused by the death of Lodge. Butler, therefore, served during the three months of the short session, while Gillett could not take the oath till the convening of the Senate of the 69th Congress, March 4, 1925.

In November, 1932, Bennett Champ Clark was elected a Senator from Missouri, for the term ending in 1939. Feb. 3, Senator Hawes, who had not sought re-election, complaisantly resigned, and the Governor of Missouri promptly appointed Clark to fill the vacancy. Upon that appointment he served only one month, but there was thus thus secured for Clark (and for Missouri) seniority's precedence over the thirty other men who had been elected on the same day with Clark. This advantage is likely to prove a very substantial one.

accordance with more or less explicit recommendations from the party's Committee on Committees. A Senator appointed to fill a vacancy caused by death or resignation is by resolution often assigned to the same committee positions which had been held by his predecessor.<sup>1</sup>

Once placed upon a congenial committee, a Senator is likely to retain that assignment as long as he remains in the Senate, or until he requests to be excused from further service thereon. When a party gets the opportunity to reorganize the Senate committees, therefore, it does not mean a wholesale overturn. To cite the illustration of most moment in the Republican reorganization in 1919: In the previous Congress the Committee on Foreign Relations had included ten Democrats and seven Republicans. Under the new organization that ratio was precisely reversed. The Democrats were reduced to seven by dropping the minority Senators who had seen shortest service on the committee; to bring the Republican membership up to ten there were added to the six hold-over Republicans four new men.<sup>2</sup>

#### THE CHOICE OF COMMITTEE CHAIRMEN

In the tentative draft apparently prepared by William Maclay for the consideration of the committee which framed the Senate's first code of rules, adopted in April, 1789, it was stipulated that each committee's chairman 'shall be the Senator from the most northerly state of those from whom the committee is taken.'<sup>3</sup> This fantastic proposal did not find its way into the rules. In fact, for the first thirty-seven years of the Senate's history its rules made no provision as to the choice of committee chairmen. The implication of Jefferson's *Manual* is that the person first named served as chairman, but only as a matter of courtesy — 'every committee having a right to elect

<sup>1</sup> Thus, Senator David A. Reed (Penn.) was assigned to the identical committee positions which had been held by his predecessor. In presenting the order, the Chairman of the majority's Committee on Committees added, 'They are the only vacancies.' (Sept. 16, 1922.)

<sup>2</sup> As had been forecast, one assignment went to New England, two to the Middle West, and one to the Far West: Moses, Harding, New, and Johnson. Much significance attached to those selections (p. 700).

<sup>3</sup> *Journal*, xiv, Rule 2. Cited by L. G. McConachie (*op cit.*, 34), with the comment: 'Such, permit us to repeat by the way, is practically the rule now, thanks to superior Yankee tenacity and longevity!' But that was written in 1898. In 1929 Senator Gould of Maine declared: 'As things stand today, there are only three Eastern Senators with important places. Twenty of the thirty-four Senate committees have chairmen from west of Chicago' (*infra*, p. 1057).



their own chairman.'<sup>1</sup> John Quincy Adams, in 1808, declared it to be the Senate's prevailing practice that 'the member having the greatest number of votes is first named, and as such is chairman.'<sup>2</sup> In 1826, on motion of Senator Chambers, the Senate determined that the Senate should proceed by ballot to choose severally the chairman of each committee, a majority of the whole number of votes given being necessary for a choice; the other members were then to be elected on one ballot by plurality vote.<sup>3</sup> For practically a century this has remained the rule, modified only by the addition of the significant phrase, '*unless otherwise ordered.*'<sup>4</sup> Probably no living man remembers an instance of full compliance with the rule, for unanimous consent to the suspension of its requirements has usually enabled the caucus to dictate chairmanships as well as the number, size, and personnel of the committees.

In making up the list of committee chairmanships the party slate-makers find their principal guide as well as restraint in the so-called 'seniority rule.' As has been noted above, when once placed upon a congenial committee, a Senator usually retains that assignment as long as he remains in the Senate. When a man enters the committee, his name is placed at the bottom of his party's column in the list of its members. As others leave the committee by death or retirement from the Senate or by party reorganization, his name gradually climbs the column until he becomes the 'ranking member,' standing next to the chairman on the majority side or leading the list of minority members. In the shifting of chairmanships in the past half-century there probably has not been one instance in fifty when the caucus Warwicks have failed to place the crown upon this universally recog-

<sup>1</sup> Sec. XI. In 1895, Senator Hoar declared: 'But without a chairman a committee, having met, can designate one of its members to present to the Senate what it agrees on, whether it has a chairman or not. The election of a chairman is a mere matter of convenience, involving the right under our rules to occupy a committee room for private purposes, and involving the right, I suppose, to appoint the clerk of the committee, though I believe he may be appointed by the committee itself, if it chooses to take the matter into his own hands.' (Dec. 30, 1895.) Cited during the Cummins-Smith contest in December, 1923.

<sup>2</sup> *Memoirs*, I, 482.

<sup>3</sup> Dec. 8, 1826. McConachie, *op. cit.*, 274.

<sup>4</sup> Rule XXIV. For reports of wrangling as to the consideration to be given to seniority, geographical location, politics, and personal claims, see Washington dispatches: *New York Times*, Jan. 23, 1919; *Boston Herald*, Jan. 10, 1930, 'Insurgency Wins Fight for Post.'

There is some ground for the belief that, during the administrations of Jefferson, Madison, and Monroe, Senate committee chairmanships were customarily assigned in deference to the President's preferences. John Quincy Adams seems to have thought such 'co-operation' highly desirable — unless it was directed against himself. McConachie, *op. cit.*, 142.

nized 'heir apparent.' So assured is such an unchallenged succession that voters are often exhorted to consider it as a main reason for re-electing a Senator of great expectations.<sup>1</sup>

Often chance makes a Senator 'heir apparent' to two chairmanships at the same time. In such a case his preference is usually allowed to determine the assignment. Thus, in 1919, Senator Warren chose Appropriations in preference to Military Affairs; in 1923, Senator Smoot took the chairmanship of Finance rather than of Public Lands and Surveys; and in 1924, Senator Borah gave up his chairmanship of Education and Labor to assume that of Foreign Relations. Momentous decisions, these, to be left to an individual Senator's liking.

There is this much of logic in the seniority rule: it usually brings to the headship of the committee a man who has had many years of experience in handling the special problems in its domain — a consideration all the more important in a system of government in which the heads of the executive departments are likely to be utter novices at their tasks.<sup>2</sup> The history of the Senate includes many great chair-

<sup>1</sup> 'No other Senator is "heir apparent" to more good chairmanships than Lodge. He is now second Republican on the powerful Finance Committee and also on the Foreign Relations Committee. If the Senate remains Republican, his prospects of a big chairmanship eventually are excellent. . . . States might well regard the prospective chairmanships which will fall to their Senators.' (*Boston Herald*, April 11, 1911.) In November, 1918, the same paper called attention to the fact that by the seniority rule the chairmanship of the Committee on Military Affairs would have come to John W. Weeks had he not been defeated for re-election. He 'would have had this post of honor and of opportunity and of leadership. And Massachusetts threw it away.' This consideration could be brought home to the members of a state party convention or of a state legislature, but it weighs very little, unfortunately, with the voter in the direct primary or in popular elections.

These things are understood better by Pittman and the few voters of Nevada, and they profit by their understanding. In the 72d Congress Pittman was ranking minority member in the Committees on Public Lands and Surveys, Territories and Insular Affairs; he was second on the minority list in the Committees on Foreign Relations, Interstate Commerce, and Mines and Mining; fourth on Irrigation and Reclamation; and headed the minority column in the special Committee on Conservation of Wild Life. For years he had been the minority's perennial candidate for President *pro tempore*. When the Democrats organized the Senate in 1933, he was unopposed for President *pro tempore*. The President's placing Swanson in the Cabinet, the death of Senators T. J. Walsh and Kendrick, and the preference shown by Sheppard and Smith for chairmanships of major committees not on the above list, seem to have left Pittman 'heir apparent,' as far as seniority alone is concerned, to every one of those seven committees! Holding the highest elective office in the gift of the Senate, he was also made chairman of its premier committee, Foreign Relations, and placed second on the majority list in four other important and congenial committees, withdrawing only from the Committee on Interstate Commerce. In 1934, by 27,581 votes out of the state total of 42,755, he was elected to the Senate for the fifth time.

<sup>2</sup> To the seasoned Senator other considerations appeal. W. M. Butler acknowledged that at first he found 'that terrible seniority rule' annoying, seeing no reason why he should 'have to take the worst seats on the worst committees.' But after four months in the atmosphere of the Senate Chamber, he saw a new light. 'The rule of seniority is troublesome, but it is necessary. Otherwise some kind of a committee would be trying

manships attained under the seniority rule, lasting through long terms and marking the most important service which these statesmen have rendered.

But, on the other hand, servile compliance with the seniority rule involves gamblers' chances.<sup>1</sup> It is a limited appeal to the lot. It implies merely duration of service on the committee — not in the least does it guarantee superior ability or fitness for leadership. Certainly in 1914 no sane man would have said that 'Gumshoe Bill' Stone was among the ten Democratic Senators best fitted to guide our foreign relations. Yet, by the merest accident of seniority in placeholding through many years as a minority member, he became chairman of the Committee on Foreign Relations,<sup>2</sup> and in 1917 his party leaders had neither the courage nor the patriotism to put aside his seniority claims out of consideration for the public good. Thus, in the critical months before and immediately following the entrance of the United States into the World War, this post of highest importance was held by a man whose presence there was denounced as 'profound national calamity.' One of the most influential journals of his own party declared:

Under disguises as transparent as any assumed by the agents of the Kaiser's propaganda in this country, he has been revealed, time and again, as one who in the presence of Germany would equivocate, abate, and even sacrifice American rights.<sup>3</sup>

to measure the importance of a man.' (Dispatch of April 21, 1925, to *Boston Herald*.) Yet, in the interest of the public, it would seem desirable that to 'a man's importance' for carrying grave committee responsibilities some other test be applied than that of his mere 'ability to survive.' A recent majority leader in the Senate told the writer that he believed that the seniority rule ought not to be rigidly applied, although a chairmanship should remain within the committee. He intimated, however, that strict adherence to the seniority rule saved a lot of friction which might otherwise lower efficiency. Senator Pepper has expressed much the same opinion thus: 'The practical question . . . is whether the frictionless operation of seniority is not on the whole to be preferred to a free-for-all contest in which success might readily perch on the banner of a lovable incompetent or of a liberal maker of political promises.' (*Forum*, Dec., 1925, 863-87.)

<sup>1</sup> Many months before the 68th Congress convened, the press noted that under the seniority rule the chairmanships of the Judiciary Committees in both the Senate and the House would be shifted from the 'dries' to the 'wets.' (*Boston Herald*, July 13, 1923.)

In the opinion of Judge William R. Green, a member of the House in eight Congresses: 'The strongest argument in favor of the seniority rule is that if it were not generally enforced the matter of the chairmanship of committees would become the subject of logrolling, personal solicitation, political and other combinations, with the result that the member who was the best manipulator would obtain the position. . . . In neither the House nor the Senate would the interests of the nation be the deciding factor.' (Letter to the writer.)

<sup>2</sup> Succeeding the statesmanlike Senator Bacon, who died Feb. 14, 1914.

<sup>3</sup> *New York World*, quoted in denunciatory editorial in *Boston Herald*, March 15, 1917. Despite the shameful record which he had made — summarized in press dis-



Though a movement for his expulsion from the Senate on charges of treason failed, his presence in the post next to that of the President most responsible for the making or marring of our national policy was not only a preposterous incongruity but a menace and a disgrace.

Not less calamitous was the seniority rule's working at an earlier period upon the approach of a grave national crisis. On the floor of the Senate December 19, 1859, Senator Pugh said:

You say you have a usage in the Senate, first, never to displace a Senator from a committee without his own consent; and, second, never to promote anyone over him. . . . Your usage is intolerably bad. It . . . has operated to give to Senators from slave-holding states the chairmanship of every single committee that controls the public business of this Government. There is not one exception.<sup>1</sup>

Adherence to the seniority rule inevitably gives advantage to the party or to the section which is most conservative in the matter of changing its Senators. The leadership which Frye and Hale and Aldrich were able to secure was largely due to the continuity of service given them by their states. It is this loyalty to their leaders in the Solid South that gives to that section such a tremendous power in committee chairmanships when the Democrats control the Senate.

Another effect of adherence to the seniority rule is the putting of the headship of Senate committees into the hands of old men. Says McConachie: 'In no other legislative body in the world do the older members govern more supremely, and the conservatism of old age is tritely proverbial.'<sup>2</sup> In 1921, the average age of the chairmen of the Senate's ten major committees was sixty-eight and one-half years. Omitting two from that list the average of the remaining eight was seventy-three. This almost automatic placing of heaviest responsibility upon the oldest has several disadvantages.<sup>3</sup> It gives the lead

patch, March 7, 1917, to *Worcester Evening Gazette* by Charles Edward Russell — in 1917 the Democrats found no way to drop him in reorganizing the committee at the beginning of the new Congress. For practically a year after our entrance into the war, he held that post till his death, April 14, 1918.

<sup>1</sup> Dec. 19, 1859, *Cong. Globe*, 178.

<sup>2</sup> He emphasizes the advantage which the practice of assigning chairmanships according to seniority of committee service has brought to the states which are most conservative in changing their Senators. Thus, in the 55th Congress, 1897-99, with two-fifteenths of the Senate's voting strength, the members from the six New England states were either the heads or heirs apparent to the headship of three-fourths of its standing committees. Every one of them had an important chairmanship, including eight of first rank. The six Atlantic states immediately to the south of them held only six chairmanships, only one of which was even of secondary importance. (McConachie, *op. cit.*, 270; 305.)

<sup>3</sup> In 1921, wrote Mark Sullivan: 'The average age of the 10 members of the Cabinet is 54. This average age of the Cabinet is in a way an expression of judgment as to what

to those most likely to be affiliated with the conservative, stand-pat elements of their own party — men with the least impulse to lead or at any rate to initiate new policies. In the second place, these venerable chairmen are not likely to have the physical stamina for the most vigorous pressing forward of committee work. There has been frequent ground for the belief that public business in the Senate was retarded and recesses were made necessary because so many chairmen of important committees were ill or tired-out. A third unfortunate result is that, by burdening these old men with heavy loads of sheer drudgery of committee administration which might be carried better by younger men of more physical vigor, we fail to conserve the ripeness and experience of our 'elder statesmen' — as do the Japanese — since we leave them so little leisure to express themselves in matters of broad judgment. A fourth disadvantage is the discouragement, the deadening of ambition, which the seniority rule puts in the way of new Senators, abounding in energy and eager for service. If they must wait a dozen years or more before scope and recognition can be theirs, what wonder is it that they lose spirit? Of course, death or retirement of men higher up may bring a chairmanship to a comparatively young man. Thus, in 1923, two major committees were headed by men under fifty, neither of whom had been in the Senate more than eight years.<sup>1</sup>

It is significant that pressure for the abolition of the seniority rule has come from within the Republican Steering Committee itself. In a letter to Lodge, who was then the majority leader, Medill McCormick, who had shown himself capable of effective legislative service, urged 'putting aside the rule under which the chairmen of the Senate committees are chosen by reason of their seniority of service on the committees and for no other reason.' While declaring

is the best age for men chosen to stand up day after day, year in and year out, under hard and continuous work. The difference between this average Cabinet age of 54 and the average Senate chairman age of 68 is 14 years of added susceptibility to the strain of fatigue and heat. It represents in a rough way the difference between the average age of men chosen for efficiency, regardless of any other consideration, and the average age of those Senators who have come to committee chairmanships hardly less onerous than Cabinet jobs through a process which takes account of seniority only.' (Mark Sullivan, in *Boston Herald*, Aug. 19, 1921. See article, also by him, 'Age Handicaps Senate Work,' *Boston Herald*, Nov. 14, 1922.) In 1923, because of the recent death of three septuagenarians, the average age of the chairmen of the 10 so-called 'major committees' was 63, far lower than usual.

In 1935 the average age of Cabinet members was 58 years, three of them being under 50. The average age of the chairmen of the ten major Senate committees was 68.8.

<sup>1</sup> Wadsworth, Military Affairs: Hale, Naval Affairs.

that the majority of the chairmen through seniority had been good chairmen, he insisted:

There have been others who were unfitted for their posts by reason of extreme old age, or of failing health, or because of great differences of opinion with the majority of their Republican associates.... The chairman of a committee acts not in his sole representative capacity but as the representative of the majority of that committee of the majority in the Senate to which he belongs. He is the executive agent of the committee, burdened with the labors of the committee, and required vigilantly to press for the consideration of the bills reported by it.

But this plea from the Senator of forty-five years met with no sympathetic response from the Republican leader of seventy-three.<sup>1</sup>

Unwillingness to act in the spirit of these suggestions may have been in part responsible for ineffective team-play on the Republican side of the Senate in several recent Congresses. When the Republicans took over the organization of the Senate in 1919, before the Republican conference committee presented the list, vigorous opposition was made to the seniority appointments of Warren and Penrose to the great Committees on Appropriations and Finance, but, after they had been approved in the conference, the fight against them was not carried to the floor of the Senate.<sup>2</sup>

Despite their failure to prevent the travesty of Stone's appointment and retention as Chairman of the Committee on Foreign Relations, the Democrats have shown a greater openness of mind than the Republicans toward proposals for making the Senate committees representative and responsible. Their Steering Committee serves also as their committee for making the Democratic committee assignments. In 1913, they gave serious consideration to a proposal by their chosen party leader, Kern, for organizing Democratic Senate control. Its most important feature was the proposal to give a majority of the Democrats on any committee the authority to control its affairs without regard to the wishes of the chairman.

<sup>1</sup> Placed in the *Record* (p. 1235) on request of a Democrat, Jan. 4, 1923. For earlier attempts to ensure a broader distribution of important committee assignments note Call's resolution of March 16, 1882, that no member should become a member of more than one of a designated list of committees, unless by special resolution of the Senate. *Cong. Rec.*, 1947; and the 'Norris Rule,' *supra*, 280, n. 1.

<sup>2</sup> On the floor of the Senate, however, the Democratic leader moved an amendment, to strike from the list the name of Penrose as Chairman of the Committee on Finance, but, the 'progressive' Republicans did not yield to his temptation. It was laid on the table by a vote of 48 to 43, May 28, 1919.



In one notable instance the Democratic caucus set aside the seniority rule in the public interest. In the reorganization of 1913, Tillman claimed that he 'was entitled under the rules of seniority which have always obtained in the Senate to the chairmanship of the Committee on Appropriations.' When the Steering Committee assigned him instead to the chairmanship of the Committee on Naval Affairs, he carried his fight to the floor of the caucus, caused to be read a letter from President Wilson saying that Tillman would be of the greatest and most constant service at the head of the Appropriations Committee, and made a most earnest appeal for that assignment. When this was denied him, he made an angry speech in the caucus, declaring his suspicion that 'some deal was being pulled off.' His first intention was to take his grievance into the Senate Chamber, but he finally decided to submit to the caucus decision in the interest of Democratic harmony.<sup>1</sup> At that time Tillman had many friends on both sides of the Chamber, and there is little doubt that the Steering Committee's chief consideration in refusing to place him at the head of the Committee on Appropriations was the belief that its burden was too heavy for a man of his advanced age and of health so impaired that in his campaign for re-election, just ended, his plea to the voters of South Carolina had been to send him back for a fourth term to the Senate, that he 'might die in harness,' as, in fact, he did before the end of his term.<sup>2</sup> It was bad enough that for over a year after the United States entered the greatest war in history the direction of the Senate's Committee on Naval Affairs should have still been, nominally at least, in his trembling hands.

#### DEMOTIONS FROM CHAIRMANSHIPS

There have been several historic demotions of committee chairmen. Thus, in 1859, while he was on a tour of the Southern States, Stephen A. Douglas, 'the only Senator from a non-slave-holding state holding the chairmanship of a committee touching the public business of the Government,' was dropped from the chairmanship of the Committee on Territories, a position which he had held from the time that he entered the Senate. Said Senator Pugh: 'You tried him, as you say, and condemned him, and executed him, in his absence, and then cited him to appear and defend himself afterwards.' He declared that

<sup>1</sup> At Tillman's request his speech, made in the Democratic caucus, was printed in the *Congressional Record*, March 17, 1913.

<sup>2</sup> July 3, 1918.

Douglas was demoted because he 'had the misfortune to entertain opinions which are entertained by almost the entire body of the Democratic Party in the Northern States.'<sup>1</sup> The bitter spirit of Reconstruction days showed itself at the opening of the session in December, 1866, when Hendricks alleged:

Three of the distinguished chiefs or heads of committees were stricken from their places and assigned to the foot of the committees. These committees had no relation to matters relating to the political questions of the day. Simply because brother Senators differ on a political question, the majority of the Senate proscribe them, and in the middle of a Congress assign them from the head of a committee to the foot of it.<sup>2</sup>

A yet more cruel blow was that which in 1871 fell upon Charles Sumner. For more than a decade he had been Chairman of the Committee on Foreign Relations, and in that position had deserved well of his country by the firmness and skill with which he had handled situations that — like the Trent Affair or French intervention in Mexico — threatened to embroil us with England or France. But he had aroused President Grant's resentment by opposition to his pet project for the annexation of San Domingo, and his long intimacy with the Secretary of State had come to an end.<sup>3</sup> Final action in the effort to depose Sumner came on a report from the Republican caucus for assignment of committees, March 10, 1871. This report placed Cameron, the ranking member, at the head of the Committee on Foreign Relations and left Sumner off the committee entirely.

<sup>1</sup> Pugh, Dec. 19, 1859, *Cong. Globe*, 178.

<sup>2</sup> Hendricks, Jan. 17, 1867, *Cong. Globe*, 520.

Contrary to precedent, at the beginning of the short session a new election of all the standing committees took place. The list submitted by the majority leader was approved without debate. Apparently the sole object of this election was to discipline the Republican chairmen who had not supported the Radicals in the vote to override the President's veto of the Civil Rights Bill. The chairmen thus demoted were: Cowan (Penn.) Patents; Dixon (Ct.), Post Offices; Doolittle (Wis.), Indian Affairs. See Doolittle's speeches, April 6, 1866, and July 28, *Cong. Globe*, 1808; 4299.

<sup>3</sup> It must be acknowledged that the bitter enmity that had developed between Sumner on the one hand and the President and his Secretary of State on the other constituted a serious objection to Sumner's continuing to hold that particular chairmanship. In 1835, Speaker Bell set aside the claims of John Quincy Adams to the chairmanship of the House Committee on Foreign Affairs in order to place at its head a friend of the Administration. He later declared that he made that appointment 'without the slightest interposition of the Executive,' and justified his action thus: 'The Committee on Foreign Affairs has charge of the branch of the public interest and business of the country placed by the Constitution more exclusively within the control of the Executive than any other. I consider the appointment of a political friend of the Executive as the chairman of that committee not to be an act of mere liberality but of patriotic duty.' Dec. 21, 1839, *Cong. Globe*, VIII, Appendix, 189.

It gave rise to an earnest debate over 'the unusual step taken by the caucus committee in deposing Sumner, without his own consent, from a place which he had held acceptably all the time that the Republicans had controlled the Senate.' Wilson, Schurz, Logan, and Trumbull spoke against the action, which Sherman characterized as 'unjustifiable, impolitic, and unnecessary.'<sup>1</sup> James G. Blaine declared:

Never was the power of the caucus more wrongfully applied.... The action of the Senate was, in effect, notice to the whole world that Mr. Sumner was to have no further connection with a great international question to which he had given more attention than any other person connected with the Government.... He declined the service to which he was assigned [Privileges and Elections, instead of Foreign Relations], and from that time forward to the day of his death he had no rank as chairman, no place upon a committee of the Senate, no committee room for his use, no clerk assigned to him for the needed discharge of his public duties.<sup>2</sup>

The opening of the Sixty-Eighth Congress, December 3, 1923, saw one of the most stubborn fights over a chairmanship in the history of the Senate.<sup>3</sup> It had not developed in the fifteen-minute Republican conference, from which certain progressive Republicans, the 'insurgents,' and the two Farmer-Labor Senators, who had accepted committee assignments tendered them by the Republicans, absented themselves. The contest was over the chairmanship of the Committee on Interstate Commerce which had been held during the previous four years by Senator Cummins of Iowa, who in the Sixty-Seventh Congress had also been President *pro tempore* of the Senate, a position which during the recess had attained greatly enhanced importance by Vice-President Coolidge's becoming President. There was a widespread feeling that it was not fair that one Senator should hold two positions of such dominance, and that in this case it was particularly undesirable, since their burdens upon a man of seventy-three would be so great that he could not properly perform the duties of both. Aside from these objections, his retention of the chairmanship of the Interstate Commerce Committee was especially

<sup>1</sup> Speeches by Trumbull and others, March 10, 1871, *Cong. Globe*, 49 ff.; Horace White, *Lyman Trumbull*, 343-47; Edward L. Pierce, *Memoir and Letters of Charles Sumner*, IV, 469-82; George H. Haynes, *Charles Sumner*, 366.

<sup>2</sup> James G. Blaine, *Twenty Years in Congress*, II, 503-06.

Note, also, the demotion of Ladd (*supra*, 292). He, however, had held the chairmanship but a few months, and had deserted his party in the recent presidential election.

<sup>3</sup> Page 252.



obnoxious to the Senators from the Northwest because of his responsibility for the Esch-Cummins Transportation Act of 1920, which the insurgents wished to see repealed.<sup>1</sup> Senator Cummins told the leaders of his party that it was for the Senate to decide whether he should retain either position or both positions, but declared that he could not conceive that there was any question of his 'right to the chairmanship of the committee.'<sup>2</sup> December 10, the majority leader made the customary motion that so much of the rules be suspended as required the election of the chairmen and of the committees by ballot, and that the committee assignments be those which he therewith presented, the list including all of the assignments as agreed upon by the Republican and Democratic Committees on Committees. An objection to their consideration *en masse* by Senator Wheeler (then serving his first week in the Senate) would have forced over to the next day the consideration of these committee assignments; but, after hasty conferences on the floor, the minority leader, Senator Robinson, obtained unanimous consent for the approval, without separate vote, of all the assignments except that of Chairman of the Interstate Commerce Committee and for an immediate vote for the filling of that position. The resultant deadlock lasted a month. One of the humors of the situation was the fact that the ranking 'Republican' to whom the seniority rule would assign that chairmanship, if Cummins were set aside, was Senator La Follette, the astute marshal of the opposition to Cummins. For him the regulars would not vote. One and another Republican further down the list was put forward, including three who had but just entered the Senate. Finally, January 9, on the thirty-second ballot, the choice went to Senator Smith of South Carolina, the ranking Democrat on the committee. This unprecedented election of a minority Senator to the headship of a major political committee had no marked effect upon the session's legislation as to interstate commerce. Its chief significance was its indication to Republicans and Democrats alike that in the Senate there was a 'bloc' holding the balance of power, in the European sense, ready to shift its votes from one party to the Opposition as might best advance this small group's favorite projects. It was an earnest of the stalling of legislation which characterized the ensuing

<sup>1</sup> In 1911, Cummins, then regarded as an insurgent, with six other Republicans had voted against the party's nominee for President *pro tempore*, with the result that a Democrat, Bacon, was then chosen to preside over a Republican Senate. *Washington Post*, Dec. 12, 1923.

<sup>2</sup> Report in *Washington Post*, Dec. 11, 1923.

session. Politically its most striking effect was to demonstrate the obstructive power which Senator La Follette could now direct.<sup>1</sup>

## SENATE COMMITTEE PROCEDURE

### *Reference*

In dealing with the 'morning business' of the daily session, the presiding officer's first call is for the presentation of petitions and memorials. Each of these must be signed by the petitioner or memorialist and bear a brief endorsement stating its contents. It is presented and referred without debate and without putting the question unless objection to such reference is made, in which case all motions relating to its reception or reference must be put in the order in which they are made, and are not open to amendment, except to add instructions.<sup>2</sup> Even more perfunctory is the procedure in case Senators have petitions, memorials, private pension bills, etc., to present after the 'morning hour.' These they may deliver to the Secretary of the Senate, endorsing upon them their names and the reference or disposition to be made thereof. With the approval of the presiding officer these petitions and memorials, bearing the names of the Senators presenting them, are then entered on the *Journal* as having been read twice and referred to the appropriate committees.<sup>3</sup>

When the introduction of joint bills or resolutions is called for, the individual Senator rises, secures recognition, and requests leave to introduce the bill or resolution which he sends to the desk, sometimes specifying the committee to which he asks that it be referred, at other times merely requesting that it be referred to the 'proper committee.'<sup>4</sup> The reading clerk reads its title and hands it to the presiding officer, who refers it to the appropriate committee.

In most cases this is a perfunctory performance, as the subject-matter of the measure indicates the only natural reference to be made.<sup>5</sup> Occasionally, however, in the absence of some interested member, the sponsor may take the opportunity to suggest and secure

<sup>1</sup> Jan. 11, 1924, *Cong. Rec.*, 774. Although thus deprived of the chairmanship, upon request of the minority leader by unanimous consent Cummins's assignment as ranking Republican member of that committee was approved.

<sup>2</sup> Rule VII, cls. 1, 4, and 5.

<sup>3</sup> Rule VII, cl. 2.

<sup>4</sup> If objected to, the bill's introduction must be postponed for one day. (Rule XIV, cl. 1.) Senators may take occasion to advise or to move that a measure be referred to a specific committee. *Cong. Rec.*, Dec. 9, 1895.

<sup>5</sup> 'Bills may be presented by Senators and placed upon the calendar without any reference whatever, and are there on a footing of absolute equality with committee measures.' McConachie, *op. cit.*, 309, citing *Cong. Rec.*, Dec. 30, 1895, 424.

reference which would not otherwise have been possible.<sup>1</sup> If there is a conflict of jurisdiction, the reference is determined by the Senate.

Certain committees have such supervisory powers that to them at one stage or another must be referred bills or resolutions which are within the province of some other committee. Thus, the Committee on Printing, unless the Senate orders otherwise, must pass upon other committees' leave to print,<sup>2</sup> and the Committee to Audit and Control the Contingent Expenses of the Senate regulates the employment of clerks, stenographers, and messengers by other committees and all proposals involving a charge upon the contingent fund. Vice-President Marshall declared: 'If any committee proceeds to make expenditures without the consent of that committee, it is taking a chance that the money will never be paid.'<sup>3</sup> Resolutions calling for expenditures are, however, often referred first to the committees dealing with their subject-matter.

### Meetings

May a committee function except upon the initiation of the chairman? In 1917 a Senator of long experience declared:

There is no way to call a committee meeting except by the call of the chairman, unless there is some other provision made with reference to some particular committees. . . . No notice is ever sent except with the order of the chairman. . . . This is the first time I ever heard any contention. . . made in this body, that a majority of the committee, by signing a paper requesting a call and then meeting, would make that a meeting of the committee.<sup>4</sup>

<sup>1</sup> Thus Senator Hill, Feb. 4, 1897, charged that advantage had been taken of his absence to refer a bill prohibiting the sale or dispensing of intoxicating liquors in the Capitol Building to the Committee on Public Buildings and Grounds. He insisted that it should have gone to the Committee on Rules, which had under its control the Senate Wing of the Capitol, but his motion to change its reference was defeated, 27 to 30.

<sup>2</sup> Rule XXIX, cl. 1.

<sup>3</sup> McConachie, *op. cit.*, 322. Gilfry, *Senate Precedents*, II, 127. Debate in Senate, Dec. 2, 1918, *Cong. Rec.*, 3-5. Marshall's ruling, Jan. 14, 1914, *Cong. Rec.*, 1623.

<sup>4</sup> Aug. 2, 1917, Senator W. L. Jones. See comments of Senators Pomerene, A. A. Jones, and H. W. Johnson. For comment on a chairman's blocking a nomination, of which he personally disapproved, by holding it for weeks without submitting it to his committee for consideration, see Smith's delay of the Tugwell nomination (p. 310, n. 4). *Cong. Rec.*, 10817, June 8, 1934.

Senator Moses has declared that a Senate committee cannot meet without the chairman's call, nor, under the practice of the Senate, may the committee be polled upon the floor without his consent. He determines the agenda for committee meetings. To a large and important committee of the 71st Congress were referred 254 bills. It considered only eleven bills and reported only seven. Yet of all the bills considered and reported, seven had been introduced by the chairman himself.



During the deadlock in December, 1923, there was discussion of the status of a committee without a chairman. Lodge and other Republican leaders were reported to hold the view that the Interstate Commerce Committee was unorganized and consequently unable to function. Dill introduced a resolution to authorize the committee to elect its own temporary chairman. On the other hand, Senator James A. Reed characterized the contest over this chairmanship as 'child's play,' and declared that the committee could function without a chairman.

In 1894, the Senate had forty-six standing committees, twenty-one of which were scheduled for regular weekly meetings.<sup>1</sup> In the short session in the winter of 1918-19, of the Senate's seventy-three standing committees only ten had regularly scheduled days for meeting. In 1935, of the thirty-three committees only six were scheduled for regular weekly meetings.<sup>2</sup> Agriculture and Forestry, Banking and Currency, Claims, Judiciary, Military Affairs.

The scope and method of the committee's work is largely controlled by the chairman, and much depends upon his personality.<sup>3</sup> Subcommittees, designated by the committee or by its chairman, may carry on preliminary investigations and formulate proposals.<sup>4</sup> Committees dealing with measures of major importance often begin work upon their problem by conducting a series of hearings. These

<sup>1</sup> Miss Clara H. Kerr, *op. cit.*, 33.

<sup>2</sup> *Congressional Directory*, issue of April, 1935. The public little realizes the burden of routine work entailed by service upon even a single Senate committee. Clark, Chairman of the Committee on the Judiciary in 1910, declared: 'In the many years that I have been a member of that committee, I can remember but one week in which it has not had its regular committee work. . . . This year, aside from all the nominations for important places that come before that committee, nominations some of which occupy the attention of the committee and the subcommittees for days and even weeks, there have been upon the calendar of the committee . . . 185 measures, some of them requiring the work of subcommittees and of the committee, itself, for weeks.' (June 18, 1910, *Cong. Rec.*, 8458.)

<sup>3</sup> The dominance of the chairmanship is easily exaggerated in popular thought, said a leading Senator of twenty years' experience. He added that he had never found difficulty in getting consideration for his own views in any committee of which he had been a member.

<sup>4</sup> Thus, Dec. 19, 1923, the Chairman of the Committee on the District of Columbia announced the appointment of nine subcommittees, each of five members, the first one designated to act as its chairman. Jan. 10, 1924, the Committee on Foreign Relations decided by a vote of 10 to 2 in favor of public hearings on the proposal of Senator Borah urging recognition of the Soviet Government of Russia. Later Senator Lodge designated Senator Borah as chairman of a subcommittee of five to consider this matter. Of course, the selection of a committee to pursue an investigation may be made by the Senate itself, quite aside from action by the committee with whose 'field' the investigation is logically associated. Of the 34 committees listed in the *Congressional Directory* of 1935, 16 had committee rooms in the Capitol; the others were in the Senate Office Building.

may be made a most valuable 'device for gleaning information and gauging public opinion' — a wholesome antidote for the insidious work of the lobby. On the other hand, the hearings may develop into wrangles between the different elements represented on the committee, each playing 'practical politics' in the attempt, not so much to gather information as a basis for wise legislation or the correction of evils, as to catch the eye of the voter through the daily press reports.<sup>1</sup> The committee may conduct its hearings and other proceedings in public, going into closed session when it sees fit.

#### RECESS COMMITTEES AND THE CONTINUANCE OF COMMITTEE SERVICE

In 1834, apparently for the first time, the Senate authorized one of its committees 'to sit during the recess,' in order that that committee (Finance) might investigate the affairs of the Bank of the United States. On several occasions in the next few years similar action was taken by the Senate; but when the House in 1841 refused to allow recess committees, Benton heartily applauded that decision, declaring that each case of appointment of a recess committee by the Senate

<sup>1</sup> For discussion of committee hearings in connection with the recent extension of Senate investigations, see p. 557.

In 1913, a resolution was introduced: 'That no committee of the Senate shall sit behind closed doors: *Provided*, however, That this rule shall not apply to any committee considering treaties, executive business, or matters affecting foreign relations.' The proposal is far more sweeping than is justified. Mr. Luce (*Legislative Procedure*, 151) commented that publicity might well be the invariable rule during the hearings, the door being wide open whenever any outsider is speaking, but that it is by no means clear that the committee's deliberations should be under the eye of every curious passer-by. 'Universal experience tells us that in all manner of conference and deliberation we reach results more speedily and satisfactorily if those persons directly involved are alone.' Committee hearings may be highly educative to the public as well as to the information-seeking members of the committee. But their serviceableness depends largely upon the fairmindedness, intelligence, and skill of the chairman. An earnest of what may be expected from the committee may often be found in the list of persons who are requested or summoned to appear before the committee.

Most hearings are conducted in quiet and decorum in the committees' own rooms. But when some sensational subject is to be ventilated, the hearings become rival 'shows.' Long before the scheduled hour, spectators form in line to scramble for the most desirable seats, the instant the door is opened. The Majority Conference Room and the Finance Committee Room seat many hundreds, and they are often crowded. Senators of the committee sit at a long table at the end of the room. At right angles to this is a table at the end of which is the seat for the person who is to testify or address the committee. At the same table are seated the lawyers representing the parties interested in the issue, and the reporters. If the hearing is likely to supply 'good copy,' a dozen press photographers may be present, and the hearing's opening hour may be much disturbed by these camera-men's wandering about to select the best points from which to snap their flashlights at the principal 'actors.' Chairmen at times seem more solicitous as to the prospective headlines and pictures and the impression to be made upon the 'gallery' than as to the information to be adduced by the hearing.

had 'become a standing argument against their existence,' and he listed as among the varieties of abuses to which they were subject 'faction, favoritism, personal objects, ungovernable expenses, and little or no utility.'<sup>1</sup>

In later years the Senate has frequently authorized both select and standing committees to sit during recess to pursue investigations as a basis for legislation or the prosecution of wrongs against the United States.<sup>2</sup> This practice has given rise to important questions especially as to the continuance of such committees and the filling of vacancies upon them. The situation in the Senate differs from that in the House, since the Senate is a continuing body to which its committees may still be held responsible, whereas with the expiration of a Congress the term of every Representative comes to an end.

For twenty years and more from March 3, 1891, it was the habit of the Senate, in the closing days of a Congress, by unanimous consent to adopt a blanket resolution, that 'the standing and select committees, as now constituted, be . . . hereby continued, with power to act, until (the first Monday in December, 1891) or until their successors are elected.' But when a similar resolution was adopted, March 2, 1915, it mentioned only 'standing committees.' April 18, 1921, provision was incorporated in the Standing Rules that all standing committees were to continue until their successors were appointed.<sup>3</sup> As to the continuance of select committees, it long remained a disputed question whether it was not entirely determined by the phrasing of the resolution by which they were created or empowered. If that phrasing was ambiguous, serious controversy was likely to arise.<sup>4</sup> Two such controversies are discussed elsewhere.

## REPORTS

Contrary to the practice in some state legislatures, Senate committees are not required to report upon each and every measure which is referred to them. It was Mr. Bryce's estimate that nineteen out

<sup>1</sup> Thomas H. Benton, *op. cit.*, II, 304-05.

<sup>2</sup> For the serviceableness of such committees as compared with commissions, see Robert Luce, *Legislative Procedure*, 178-79; W. F. Willoughby, *Principles of Legislative Organization and Administration*, 586-87.

<sup>3</sup> Rule XXV, cl. 2.

<sup>4</sup> The controversy over the committee to investigate the alleged failure of Attorney-General Daugherty to prosecute properly violators of the Sherman Anti-Trust Law (p. 513); the controversy over the 'Slush Fund Committee' dealing with (1926) election expenses (p. 538). Principles and precedents relating to recess committees are very fully set forth by Dr. Charles C. Tansill, *National University Law Review*, May, 1928, 3-42, 'The Smith-Vare Case and Its Relation to Senate Procedure.'



of twenty bills sent to congressional committees never emerge from the committee room. Considering the ease and the irresponsibility with which bills are introduced and referred, probably the mortality is not heavier than is desirable, though it might well be more selective.

The committee's report is usually submitted by the chairman if it is in accord with his personal views. Often the dissenting 'views of the minority' are reported and made a matter of record, being brought out as a supplement to the committee's report.

#### THE DISCHARGE OF COMMITTEES

In the House since 1910 there has been a Calendar of Motions to Discharge Committees and a procedure by which it is possible, on motion filed with the signatures of a certain number of members, the question shall be brought to a vote whether a committee shall be discharged from further consideration of a bill or resolution which had been referred to it.<sup>1</sup> Protracted struggles have developed as to the number of signers requisite.<sup>2</sup> In 1933 it was reported that the Rules Committee was resolved to insist upon raising the number from 145 to 218, their object being to prevent bills for currency inflation or cash payment of the bonus being brought back from committee to the floor, thus threatening President Roosevelt's program of emergency legislation. Strong protest from a large group of insurgents led to an immediate abandonment of the attempt to apply such a 'tight' rule.<sup>3</sup>

In the Senate no elaborate procedure is necessary: any member may introduce a motion that a committee be discharged from further consideration of a measure which has been referred to it. If objection is raised to immediate action, such a motion must lie over one day. If the Senate approves such discharge, the bill comes directly before the Senate. This action may be sought by those who feel that the committee is unreasonably delaying or preventing the Senate's consideration of a measure favored by a majority.<sup>4</sup> On the other hand, the discharge motion may be introduced by the chairman of the

<sup>1</sup> July 17, 1910, *Cong. Rec.*, 8439-45.

<sup>2</sup> At first a majority was required; then 150. In 1924, after weeks of debate, it was reduced to 100. In the next Congress, when majority control was better secured, it was raised to 145.

<sup>3</sup> Washington press dispatches, April 18 and 19, 1933.

<sup>4</sup> The majority leader threatened such action unless the Chairman of the Committee on Agriculture and Forestry forthwith should report upon a nomination which he had held for many weeks without bringing it before his committee (p. 306, n. 4).

committee, as a means of putting an end to dissension within the committee itself.<sup>1</sup>

## JOINT COMMITTEES

---

Far less use has been made of joint committees than seems to have been anticipated at the start. In the opening weeks of the First Congress a number of select joint committees were 'raised' — for example, to prepare rules governing the contacts of the two Houses, and to choose chaplains;<sup>2</sup> and, until the clash came between the House and the Senate over titles for the President and Vice-President and the proposal of higher salaries for Senators, the Senate seemed especially partial to this mode of securing accordant action.<sup>3</sup>

One promising service of a joint committee soon came to an untimely end. August 5, 1789, the Senate appointed three of its members 'a committee, jointly with the committee from the House of Representatives, to consider what business is necessary to be acted upon prior to an adjournment,' and report the proper time for adjournment. Thus, more than six weeks before the end of the very first session of Congress, a joint committee was assigned the task so to 'route' the business of Congress that the essential measures should secure time for action. Such joint steering committees were frequently appointed in the early days.<sup>4</sup> But enthusiasm for such action soon waned. In 1794, such a proposal, passed by a majority of one in the Senate, in the House was declared to be 'not in itself worth a moment's consideration,' and was defeated by a very large majority.<sup>5</sup> In recent years,

<sup>1</sup> Page 561. The Watson-Couzens controversy.

<sup>2</sup> April 9, 1789.

<sup>3</sup> McConachie, *op. cit.*, 240.

<sup>4</sup> Senate action of Jan. 11, 1790; Dec. 8, 1794; March 13, April 1 and 8, 1806.

<sup>5</sup> Dec. 8, 1794, *Annals of Congress*, 799; Dec. 10, p. 972. A typical resolution was that of March 7, 1794: 'That Messrs. King, Langdon, and Strong be a committee to join with such a committee as the House of Representatives may appoint on their part, to consider and report what business is necessary to be done by Congress in the present session, and what part of the business now depending may be, without great inconvenience, postponed, until the next session, that the proceedings may be so regulated as to close this session by the first Monday in April next.' The session actually ended June 9.

whatever steering is done is determined upon by leaders and groups responsible, not to the two Houses, but to the party organizations in each.

Select joint committees for the most part have been made use of to adjust interests of the moment between the two Houses, or to give both the Senate and the House representation on ceremonial occasions. A small joint committee waits upon the President, at the beginning of each session, to announce that Congress is organized for business and, at the end of the session, that it is ready to adjourn. December 8, 1923, seven Senators were appointed members of a joint committee 'to arrange the action of Congress on the death of President Harding.' <sup>1</sup>

Certain select joint committees, concerned with routine legislative business, grew into standing committees and have continued to function as such, although the joint rules of the two Houses ceased to exist in 1876.<sup>2</sup> Such are the Committees on Enrolled Bills, on the Library, on Printing, and on the Disposition of Useless Executive Papers. By convention a Senator acts as chairman of each.

Sometimes a common task of investigation or formulation is assigned to a joint committee. On the regular committee list of the first session of the Fifty-Ninth Congress was a Senate committee of nine members on Revision of the Laws of the United States, but on the day of Congress's final adjournment March 2, 1907, in both the House and the Senate there were appointed members of a joint committee 'to consider the revision and codification of the Laws of the United States.' Of the five Senators named, not one had been a member of the committee which had ostensibly been handling the same task.

An emergency sometimes induces resort to a joint committee. In the controversy over the admission of Missouri as a state, Henry Clay took the lead in the House in proposing that the problem be referred to a joint committee of Congress. To serve on this, the House chose twenty-three members.<sup>3</sup> The Senate acceded to the proposal by a vote of more than four to one, and seven Senators were chosen to serve on this committee. The result of its deliberations, though a triumph for Clay, was adopted by the Senate by a vote of two to one, while in the House it narrowly escaped defeat.<sup>4</sup> During the decade

<sup>1</sup> *Cong. Rec.*, 106-253.

<sup>2</sup> Gilfry, *Senate Precedents*, I, 441-42.

<sup>3</sup> The same number as the entire number of states at that time. Feb. 22, 1821, *Annals of Congress*, 1219-20.

<sup>4</sup> Feb. 26-27, 1821, *ibid.*, 388; 1239. Schouler, *History of the United States*, III, 184.



following the outbreak of the Civil War, joint committees came into more frequent use than at any other period in the history of Congress. The urgency of the issues, the economy of time and money in conducting a single investigation, and the jealousy of Congress — its two branches now under the control of the same party — because of the autocratic activities of President Johnson particularly as to reconstruction, disposed the Senate and House to seek accord through joint committees rather than through conferences. Of the long list the most notable was the Committee on the Conduct of the War, the outgrowth of debate over a resolution directing an inquiry by a committee of three into the disasters at Bull Run and Ball's Bluff. It consisted of three Senators (Wade, Chairman, Chandler, and Andrew Johnson) and four Representatives.<sup>1</sup> Schouler attaches high historic value to the testimony collected by this 'joint inquisition of Congress, though its proceedings had somewhat of a partisan direction.'<sup>2</sup>

These post-war committees may have suggested a very comprehensive proposal put forward in September, 1918, by Senator Weeks, calling for the creation of a Joint Congressional Committee on Reconstruction.<sup>3</sup> High praise was given to this proposal in the Senate. 'There is good brain work behind it. There is foresight and statesmanship in it.'<sup>4</sup> But the struggle over the Treaty of Versailles soon thrust every other problem of reconstruction aside.

In 1926 there was created a new Joint Standing Committee on

<sup>1</sup> 'This committee on the Conduct of the War became at once an inquisition. Though armed with no power but publicity, its close connection with congressional intrigue, its hostility to the President, the dramatic effect of any revelation it chose to make or any charges it chose to bring, clothed it indirectly with great power. Its main purpose may be stated in the words of one of its members: "A more vigorous prosecution of the war and less tenderness toward slavery." Its mode of procedure was in constant interrogation of generals, in frequent advice to the President, and on one occasion in threatening to rouse Congress against him.' N. W. Stephenson, *Abraham Lincoln*, 204-05.

<sup>2</sup> Schouler, *History of the United States*, VI, 163, n. 3.

<sup>3</sup> Sept. 27, 1918, S. Con. Res. 21. It proposed a joint committee of six Senators, six Representatives. Three Senators were to be chosen by the Republican senatorial conference and three by the Democratic senatorial caucus, and the House members were also to be chosen by the party organizations of that body. It was to be empowered to make investigations and report to Congress from time to time upon a very comprehensive list of topics which were sure to be involved in reconstruction. Senator Owen commented: 'England has 83 committees dealing with the reconstruction problem, chosen from the very best men in the Empire.'

<sup>4</sup> La Follette, March 4, 1919, *Cong. Rec.* 4988. He added: 'Nothing has been done. ... Instead, sir, we have the spectacle of the President calling together governors and mayors and local officials for a conference upon national problems which can only be dealt with by Congress.' *Ibid.*, 4991.

Internal Revenue Taxation. The proposal originated in the House, and grew out of the belief that a temporary commission, completing its work in two years, could accomplish a much-needed simplification of the tax laws, and suggest plans of a general nature for their improvement. Accordingly, the House bill provided for a temporary commission of fifteen members, five from the Senate, five from the House, and five appointed from the general public by the President of the United States, who was also to name the chairman from the public's representatives. This organization underwent radical transformation in the Senate, by amendments calling for a joint standing committee of ten, five chosen from and by the Senate Committee of Finance and five from and by the House Committee on Ways and Means — the joint committee to name its own chairman. In the Senate these changes were urged in order that the committee might not simply work out simplification and suggest improvements in the law, but that it might provide for careful and constant investigation and secure constructive publicity. Accordingly, the Senate amendments conferred upon the joint committee fullest powers of investigation, and authorized it to report its findings to either of the legislative committees from which its members were chosen, to the Senate, to the House, or to both. Several Senators queried whether, if such a joint committee were established, 'there will be need for publicity further than will be made public by the joint committee,' but others doubted whether such a committee — 'itself shrouded with a cloak of secrecy as to all the investigations it may make' — would assure the kind and degree of publicity needed.<sup>1</sup> The elimination of representatives of the public (as had been provided in the House bill) was advocated on the ground that it would take nine-tenths of the legislators' time on the committee to explain to their lay colleagues just what the acts meant, and how the practices had grown up since 1913.

Every important Senate amendment became a part of the law. There resulted, therefore, a congressional joint committee, with unlimited powers of investigation as to the administration of one of the most complicated and important administrative services. Although the framing of this law illustrates the fact that the House often proposes but the Senate disposes, nevertheless, when the new Joint Committee on Internal Revenue Taxation came together to organize, after some contest they elected as their Chairman, William R. Green,

<sup>1</sup> Obviously both groups had in mind the activities of the investigating committee which under the instigation of Couzens had caused such controversy in 1924 (p. 561).

Chairman of the House Ways and Means Committee, and that position continued to be held by a Representative till 1933,<sup>1</sup> when it passed to Harrison, Chairman of the Senate Committee on Finance.

It remains to be seen how significant the innovation in congressional procedure represented by the creating of this joint committee will prove. In state legislatures, notably in Massachusetts, the consideration of most important legislative measures is carried forward in joint committees. In Congress — where much of the legislation is more 'political' in its nature, and where the two branches are often controlled by different parties — such a procedure has been thought to be impracticable. Nevertheless, if the object of the committee hearings is to get at basic facts, it would seem that the service of joint committees, conducting hearings and making reports, might avoid enormous waste of time and duplication of effort.<sup>2</sup>

<sup>1</sup> The Senate had always insisted on having the chairmanship of any joint committee, but Garner, a House member, at once made the point that, in view of the fact that the Constitution gave to the House the sole authority to originate revenue bills, the chairman of this committee should be a House member, and some Senate members agreed that this position was well taken. The inevitable makeup of the Senate and House delegations of five in this joint committee seems to be from the names heading the party columns in the Senate and House Committees. Thus, in 1935 the Senators were: Harrison, King, George, Keyes, Couzens; Representatives: Doughton, Hill, Cullen, Treadway, Bacharach; and the chairmanship returned to the Chairman of the House Committee on Ways and Means, Doughton.

This joint committee was created by Chapter 27, of the Act of February 26, 1926: An Act to reduce and equalize taxation, to provide revenue, and for other purposes. The staff of the committee has been organized in two sections: the Division of Simplification and the Division of Investigation. The former has made extensive studies of needed changes in revenue laws (*Report of Joint Committee on Internal Revenue Taxation*, 1928) and is a valuable aid in giving information on technical matters to both Senate and House committees. The Division of Investigation has studied the actual operation of certain taxes, making suggestions for their modification so as to prevent avoidance and evasion. A recent law requires examination and report by the joint committee in all cases of refunds above a certain amount of taxes paid by large taxpayers. In practice the Bureau of Internal Revenue in cases involving large amounts usually will not approve any refund which is likely to be positively disapproved by the joint committee. This requirement that refunds be examined by the joint committee is said to have had a very wholesome effect, but question has been raised whether its Investigating Division has acted as vigorously as it should in carrying out its own convictions.

From the beginning the staff has been selected entirely without regard to political views, and changes of chairmen and of party control have been the cause of no removals. But, says Judge Green: 'The staff of the committee will never attain its complete usefulness until it is made as independent as the English Civil Service experts.'

<sup>2</sup> Robert Luce, whose service in seven Congresses had been prefaced by an apprenticeship of seven terms in the Massachusetts House of Representatives, lays great stress upon the advantages of the joint committee, in the saving of time, in the reconciling of differences of detail before the report is made, and in the establishing of personal contacts between the members of both branches, thus promoting harmonious co-operation, the lack of which he considers the most serious defect in congressional machinery, resulting in the failure of important measures in every Congress because they did not secure consideration in both House and Senate. For this lack of co-operation he held the Senate to be 'the chief sinner.' *Congress: An Explanation*, 31-32.



Doctor William F. Willoughby has suggested that the committee organization of the two Houses might be greatly improved and, if not the use of joint committees, at least the joint action by the committees of the two Houses on specific measures might be greatly facilitated by the correlation of the committee systems of the two Houses with each other and with the Administration. The failure of the two Houses of Congress to set up committee systems running parallel with each other with respect to their several jurisdictions seriously complicates the task of reaching an accord on policies and action. Nor has either made any adequate effort to have that scheme conform to the distribution of responsibilities which Congress has provided for the administrative branch. If the committee system of the two Houses conformed more closely with each other and with that of the administrative branch, the performance of the most important continuing task of Congress — that of acting as a board of directors of the government corporation — would be greatly facilitated.<sup>1</sup>

<sup>1</sup> This paragraph is a drastic abridgment of Doctor Willoughby's proposal, which deserves careful study in his chapter of 'Committee Structure and Composition,' in *Principles of Legislative Organization and Administration*, 357-60.

The probable attitude of the House and Senate toward such correlation was illustrated in June, 1929, when President Hoover urged the advisability of having an investigation by a congressional joint committee run along with the work of the Wickersham Commission on Law Enforcement. The proposal was pigeonholed by the House leaders, who regarded it as a maneuver to throw responsibility back on Congress. Months later, the President alleged that the lack of such a committee had held up the reports of the Commission. January 16, 1930, with no debate the Senate adopted a resolution to create a joint congressional committee relating to the reorganization and concentration of the agencies connected with prohibition enforcement. (S. J. Res. 53; *Cong. Rec.*, 704, Dec. 16, 1929.) In the House this was referred to the Committee on Rules, from which it never emerged. In fact, the Speaker, as counseled by the floor leader and the Chairman of the Rules Committee, forthwith announced that the standing committees of the House and Senate were entirely adequate to consider any recommendations that the President or the Commission might care to submit, and that the creation of a new joint committee would only mean further delay. The proposal met with favor in neither branch. To the offishness and latent jealousy of each other which always characterize them there was added the alleged fear that such a joint committee, created at the request of the President, might try to usurp the functions of some of the standing committees, and bring upon Congress criticism which should remain upon the Administration.

---

‘THE SENATE AS IN COMMITTEE OF THE WHOLE’

---

But one bill had been passed by the Senate in the First Congress when it adopted a resolution:

That all bills on a second reading shall be considered in the same manner as if the Senate were in Committee of the Whole, before they shall be taken up and proceeded on by the Senate according to the standing rules, unless otherwise ordered.<sup>1</sup>

In the revision of 1806, in almost identical phrasing this appeared as Rule XIX, and till 1930 it survived in the Standing Rules of the Senate in the following form:

Rule XV. 1. All bills and joint resolutions which shall have received two readings shall first be considered in the Senate as in Committee of the Whole, after which they shall be reported to the Senate; and any amendments made in Committee of the Whole shall again be considered by the Senate, after which further amendments may be proposed.<sup>2</sup>

For hundreds of years this mode of proceeding had been a favorite in Parliament, largely for the reason that ‘the sense of the whole is better taken in committee, because in all committees everyone speaks as often as he pleases.’<sup>3</sup> It was often resorted to by the Continental Congress, and the Federal Convention of 1787 early began to ‘resolve itself into a Committee of the Whole House to consider of the State of the American Union.’ In the first set of Rules of the House of Representatives, adopted April 7, 1789, one of the four general divisions, comprising seven rules, was ‘Of Committee of the Whole House.’<sup>4</sup> When the House of Representatives resolves itself into a

<sup>1</sup> May 21, 1789, *Senate Journal*, 28.

<sup>2</sup> Edition of 1923. Bills upon being reported from a committee to which they had been recommitted were also required to be ‘considered as in Committee of the Whole,’ by Rule XV, cl. 2. For similar consideration of treaties, see Rule XXXVII, cl. 1.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 263. *Jefferson's Manual*, sec. XII, citing *Scob.* 49.

<sup>4</sup> For discussion of the Committee of the Whole in the House of Representatives see J. L. McConachie, *Congressional Committees*, especially 93 to 108. He characterizes it as ‘the House in undress uniform — the House with its coat off.’ De Alva S. Alexander, *History and Procedure of the House of Representatives*, 256–72. Asher C. Hinds, *Precedents of the United States House of Representatives*. McConachie's analysis of the

Committee of the Whole House, the Speaker leaves the chair, after having appointed a Chairman to preside. Indeed, in the early years of Congress the Speaker used to withdraw from the Chamber, as did his prototype in the House of Commons in the days when the Committee of the Whole came into service, the Speaker then being under suspicion of acting as a talebearer to the King.

In the Senate of the First Congress, Vice-President Adams seemed unwilling to follow the Speaker's example. Maclay recorded, May 25, 1789, 'According to Elsworth's resolution, we were to act as if in a committee of the whole. But the Vice-President kept the chair, and I thought it made Mr. Elsworth look foolish.'<sup>1</sup> A few weeks later Adams 'showed a peevish obstinacy, as I thought. He does not like the doctrine of a committee of the Senate; nor has he ever submitted to it, for he ought to leave the chair.'<sup>2</sup> Later presiding officers in the Senate made a practice of calling some Senator to the Chair to preside during its sitting as in Committee of the Whole; but in recent years this has rarely been done. Not only did no change of presiding officer — as in the House — mark the transition, but in other respects the procedure has shown less contrast with that of the Senate in ordinary session than is to be found in Committee of the Whole sittings of other parliamentary bodies. Jefferson noted this difference, pointing out the particulars in which Senate practice is unique.<sup>3</sup>

If several amendments had been made as in Committee of the Whole, when the measure was reported to the Senate it was customary for the presiding officer to ask if any Senator desired separate action upon any amendment or amendments. If not, the vote was upon the amendments taken together. If there were reservations, the vote was first taken upon all others agreed to as in Committee of the Whole, and then separate votes were taken upon the amendments reserved.<sup>4</sup>

In accordance with the above statement of the rules and practice, before a measure got its third reading in the Senate, it received a

reasons why the Republicans emphasized its important services while the Federalists disliked and distrusted it (pp. 96-97), are of interest. Fisher Ames declared: 'Our great committee is too unwieldy for this operation [correcting little improprieties]. A great clumsy machine applied to the most delicate operations — the hoof of an elephant to the strokes of mezzotinto. We could not be so long doing so little by any other expedient.' Ames, *Works*, I, 61.

<sup>1</sup> *Journal*, 49.

<sup>2</sup> *Ibid.*, 101, July 6, 1789.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 264. Jefferson's *Manual*, secs. XII, XXVI, and XXX.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 264. See Cullom's statement of this practice, March 26, 1896, *Cong. Rec.*, 3219.



preliminary consideration in Committee of the Whole, where each Senator might speak as often as he pleased, where any number of amendments might be proposed, discussed, and voted upon, every one of which must later be passed upon by the Senate, where still further amendments might be debated and voted upon. This suggests a duplicated and most time-consuming procedure. It did, in fact, afford an opportunity for painstaking analysis and discussion of any measure which seemed to require them; but, on the other hand, when the Senate was dealing with routine measures which aroused no dissent, the procedure was 'telescoped' to an astonishing degree without causing protest. For example, a part of the session of January 2, 1925, was devoted to 'clearing up the calendar.' Uncontested bills were called in order, and one hundred and thirty-six were 'passed.' In the great majority of cases, the bill sped on its way through both the 'Committee of the Whole' and the 'Senate' in less than thirty seconds. For this was the almost unvarying formula:

Presiding Officer: The Clerk will report the next bill.

(The Clerk reads the number and abbreviated title of the bill.)

Presiding Officer: The bill is in Committee of the Whole, open to amendment. (Pause.) Without objection, it will be considered as passed through its various parliamentary stages (Pause), and passed.

The Clerk will report the next bill.

If in one of these pauses a Senator interjected an 'Over,' the presiding officer said: 'Objection is made. The bill goes over.'<sup>1</sup> Occasionally a few words of explanation were volunteered, or given in response to a question. Usually they sufficed; if not, the bill 'went over.'<sup>2</sup>

In most American state legislatures the use of the Committee of the Whole has been allowed to lapse, though capable of being put to good use in dealing with complicated measures, full of details, by making possible the discussion of their propositions, one at a time.<sup>3</sup> In the Senate, as has been seen, it became 'a rather stupid and clumsy fiction.' In 1930 the Senate followed the general tendency of American legislative bodies by striking from its rules as to regular legislative procedure all provision for consideration of bills or resolutions 'as in

<sup>1</sup> Vice-President Marshall's occasional formula was: 'Over she goes!'

<sup>2</sup> During most of the session Willis was in the Chair. At two o'clock he announced: 'The hour of two o'clock having arrived, the Chair lays before the House the unfinished business' — and identically the same procedure continued.

<sup>3</sup> Robert Luce, *Legislative Procedure*, 91-92.

Committee of the Whole.’<sup>1</sup> The result is that that form of procedure is now retained only in the requirement that treaties when acted upon in executive session shall be considered first as in Committee of the Whole.<sup>2</sup>

## COMMITTEES OF CONFERENCE

---

### THE PURPOSE OF A CONFERENCE COMMITTEE

In the organization of the American Congress ‘the bicameral system was carried to a greater extreme than in any other legislature in the world.’ At the very start it was foreseen that provision must be made to facilitate legislation at times when the two Houses were not in agreement. Indeed, on the very first day after the Senate was organized, it appointed a committee to ‘prepare a system of rules to govern the two Houses in cases of conference and to confer thereupon with a committee of the House of Representatives.’<sup>3</sup> A week later the recommendation of this joint select committee was adopted and became Rule I, in the code of joint rules which remained in force for nearly a century. Although in 1876 the Senate declared these to be no longer in effect, in practice many of these venerable rules are still followed.<sup>4</sup>

Although dissent over amendments — as indicated by this rule — has been the usual occasion for the forming of a conference committee, such conferences have been sought for general purposes when no disagreement whatever has arisen between the two Houses. The forming of the committee which framed this very rule is the original precedent for such a committee to facilitate harmonious action between the two Houses.<sup>5</sup>

<sup>1</sup> From Rule XV, par. 1, was struck out the entire portion quoted (p. 317), and from par. 2, the following: ‘... and when again considered by the Senate it shall be as in Committee of the Whole.’ S. Res. 227, agreed to May 16, 1930.

<sup>2</sup> Rule XXXVII, sec. 1, par. 2.

<sup>3</sup> *Senate Journal*, 9, April 7, 1789.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 281.

<sup>5</sup> Illustrations of conference committees chosen to cope with problems are: (1) Feb. 21, 1821, the Senate authorized the appointment of seven Senators to join with twenty-three Representatives to determine what legal provision should be made ‘adapted to the condition in Missouri.’ (2) Dec. 15, 1876, the Senate appointed seven of its mem-

## WHO REQUESTS THE CONFERENCE, AND WHEN?

When Senate amendments to a House bill have been disagreed to by the House, the option is presented to the Senate whether it shall insist upon its amendments and ask a conference, or shall at once adhere to its amendments, and thus probably avoid a conference. Precisely this option was presented in 1826 to the Senate Committee on the Judiciary, to which had been referred the House resolution requesting a conference upon a bill to amend the judiciary system of the United States. In accordance with the recommendation from the committee made by Van Buren, the Senate declined the invitation to join in the conference on the ground that the Senate's vote upon adherence had been so decisive as to make a conference an unprofitable formality.<sup>1</sup> A few years later, Webster, from the Committee on Finance to which had been referred the request from the House for a conference over the disagreeing votes upon an appropriation bill, cited the above precedent as illustrating the undeniable right of the Senate to refuse such a conference, but he declared:

It is usually esteemed more respectful and more conducive to that good understanding and harmony of intercourse between the two Houses which the public interest so strongly requires, to accede to requests for conferences even after an adhering vote. Such conferences have long been regarded as the established and approved mode of seeking to bring about a final concurrence of judgment in cases where the Houses have differed. . . . It should only be, therefore, as the Committee think, in instances of a very peculiar character, that a free conference, invited by the House, should be declined by the Senate.<sup>2</sup>

When the House disagreed with Senate amendments to a bill, it was the earlier practice for the House to inform the Senate of the disagreement, whereupon the Senate might insist upon its amendment and request a conference. In the hurried days toward the close of a session, however, it became customary for the House in non-concurring with amendments to ask for a conference; in recent years this is a frequent procedure, even when the end of the session is not at hand.<sup>3</sup>

bers to act with the committee named in a message from the House to recommend a method of dealing with the Hayes-Tilden electoral votes. The Electoral Commission was the outcome. Conference committees have been chosen to consider the prerogatives of the Houses, particularly as to financial legislating.

<sup>1</sup> May 8, 1826, *Journal*, 306-07. Gilfry, *Senate Precedents*, I, 286-361.

<sup>2</sup> Jan. 23, 1834, *Journal*, 112. Other conditions than this typical one of the adherence by the Senate to its amendments to which the House has disagreed are set forth in Gilfry, *Senate Precedents*, I, 359-64.

<sup>3</sup> Discussion by Sargent, in Senate, April 25, 1876, *Cong. Rec.*, 2732-34.



In 1884, Frye declared that he had known many instances where one House had asked a conference with the other before the other had had an opportunity to disagree to its amendments, and, despite vigorous opposition, his motion that such action be taken in regard to the pending shipping bill was carried by a large majority.<sup>1</sup> Bayard and Sherman argued strongly against Frye's contention. Bayard deplored this practice which, he said, had hitherto been applied only to financial bills at the end of a session, whereas this was a measure of general legislation.<sup>2</sup> Sherman declared that such a practice as that of sending to a committee of conference amendments which had never been read or considered by the House, once adopted and engrafted on the parliamentary law or practice of the two Houses, would be dangerous to the last degree. In defense of his own motion, Frye said that if the pending bill should go to the House without the Senate's request for a conference, under the iron rule of the House it would go to the Committee of the Whole with one hundred and thirty-six bills on top of it, so that it could not be reached in nine months' time, whereas the request for a conference attached to the bill sent it to the Speaker's table, whence it was privileged to go at once to the Committee of the Whole for early consideration. In present-day practice such a Senate-amended bill, returned to the House with a request for a conference, would not be treated as privileged.<sup>3</sup>

#### THE CHOICE OF 'MANAGERS' OR CONFEREES

The representatives of each branch of Congress, though mentioned as 'conferees' in the resolutions which authorized their selection, sign the report as 'managers' on the part of the Senate and of the House, and formal vote of the House has recognized 'managers' as their proper designation.<sup>4</sup> By almost unbroken practice, the Chair, by unanimous consent, has appointed them. In 1905, Senator Gorman declared that he had known of no exception in the previous thirty years. But the Chair does not make these appointments with

<sup>1</sup> 28 to 17. Speeches of Frye, Bayard, and Sherman, May 13, 1884, *Cong. Rec.*, 3974-76, 4098-4101.

<sup>2</sup> Frye dissented to this statement.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 370. Speaker Reed in a ruling once declared: 'The request of either House for a conference . . . in courtesy should indicate or should come after an absolute disagreement between the two Houses. . . . But either can ask for it before. . . . I suppose that . . . the Senate might pass a bill and ask for a conference upon it without the House having received the bill.' *Ibid.*, 373.

<sup>4</sup> June 26, 1786, *Cong. Rec.*, 4155.

a free hand, for almost always the Senate's conferees have been — so Senator Gorman declared — 'the chairman of the committee who has charge of the bill and usually the senior member of the majority next to him, and the senior Senator representing the other side of the Chamber.'<sup>1</sup> In fact custom has gone further, so that the chairman of the committee usually designates certain members of the committee to act in the conference.

Conferees have occasionally been named with the deliberate intention of hastening a reversal of the Senate's stand. This is a 'trick of the parliamentary trade.' It may sometimes succeed, but it is sure to give rise to embarrassments.<sup>2</sup> In the later weeks of the

<sup>1</sup> Feb. 20, 1905, *Journal*, 248; Gilfry, *Senate Precedents*, I, 306.

## <sup>2</sup> APPOINTMENT OF SENATE CONFEREES BY THE CHAIR

April 8, 1935, Vice-President Garner, after announcing his appointment of Senate conferees upon a certain bill as ordered by the Senate, took occasion to make a statement 'concerning the future policy of the present occupant of the Chair in the matter of appointing conferees.' He summarized the current practice, whereby the Senator in charge of a bill asks for a conference, and that the Chair appoint the conferees on the part of the Senate.

He sends to the Chair the names of the conferees. So far as the Record shows, the occupant of the Chair appoints the conferees, whereas as a matter of fact, he exercises no discretion and does not even see the names of the conferees until they are sent to the Chair.

Hereafter the present occupant of the Chair expects to exercise some discretion in the matter of selecting conferees when the Senate authorizes him to make the appointments.

The Chair mentions this now so that no Senator in the future may think that he is slighted or otherwise discriminated against if he asks unanimous consent that the Chair appoint conferees and sends up his list and those named on the list are not appointed. The Chair merely desires to give notice of his course in the future. If there is any reaction to the contrary, the Chair would like to know it.

The minority leader at once reminded him that the appointment of conferees, like the appointment of standing committees, must be by a majority vote of the Senate by ballot unless otherwise ordered, citing sec. 17 of the *Manual* as to 'Conferences,' and the official construction thereof. He further emphasized it as of vital importance, that 'in the selection of conferees, whether undertaken by the Senate or, by unanimous consent, by the Chair, consideration should be given to those friendly and in sympathy with the bill which goes to conference.' His understanding of the rule (as set forth in statement on page 204, *Senate Manual*) was that 'the majority, at least of the conferees, must be sympathetic with the prevailing opinion, which must be the majority of the Senate who support the measure; otherwise, it would not go to conference.' The Vice-President replied: 'That will certainly be the policy of the present occupant of the Chair.' (*Cong. Rec.*, 5296.)

Norris commented: 'The Chair has the legal right to disregard that custom entirely, take his authority from the motion which is adopted, and appoint anyone he sees fit. He has the authority to do it when that motion is agreed to; but the other custom runs back a great many years, and the Chair would get into trouble right away if he disregarded it; he would find himself in hot water; and probably not many motions of that kind would be made after that.'

Suppose, for example, that in the controversy in 1934 over the 'Stock-Exchange Regulation Bill,' Chairman Fletcher had sent to the Chair his 'little pink slip' bearing the conventional list; that would have included with his own the names of the ranking Democrat (Carter Glass) and a leading Republican member of the committee. It would have represented the majority view in the Senate on the most vital point of difference. But if Vice-President Garner, in such a case, should have 'exercised some

hectic second session of the Seventy-Third Congress, the so-called 'Stock-Exchange Regulation Bill' came up to the Senate. It provided that the regulatory powers should be exercised by the Federal Trade Commission, to which two new members were to be added. Already James M. Landis had been appointed to that commission, and seemed to have become its dominant member; and it was understood that Landis had outlined the procedure, set forth in the House bill, by which stock-market regulation was to be carried on by that commission. In the Senate the bill was radically amended, notably in the transfer of the control from the Federal Trade Commission to a new and entirely independent agency. The House disagreed to the Senate amendments and requested a conference. As conferees on the part of the Senate the presiding officer appointed Fletcher, Chairman of the Committee on Banking and Currency, and named as his colleagues two Democrats, Barkley and Byrnes, and two Republicans, Couzens and Goldsborough, the list which had been sent up to him by Fletcher. Forthwith Carter Glass announced his resignation from the Committee on Banking and Currency. Of its chairman's passing over him in naming the conferees he bluntly declared, 'It was a direct affront and a gratuitous indignity, and deliberately intended to be.' This was no mere matter of personal pique. By tradition, as majority member ranking next to the Chairman, he would be the natural first selection. But that was a minor matter. In the entire committee of twenty-three there was no other man who in public esteem was better fitted by ability and by experience to deal with the matters in question. In addition to many years of eminent service in both House and Senate, he had been a successful Secretary of the Treasury, and intimately familiar, from the days of their creation, with the work of the Federal Trade Commission and the Federal Reserve Board, both of which would inevitably be concerned with stock-exchange control. He earnestly believed that to vest these new and variant powers in an enlarged Federal Trade Commission, already overburdened and not too efficient in handling its own tasks, would be most unwise. He wrote the Senate amendments, and he won them through the committee

discretion' in attempting to do what Fletcher did, appoint a group favorable to the President's scheme for control through the Federal Trade Commission, he certainly would have found himself in hot water. It is also to be remembered that the Vice-President and the Senate have often been of opposite parties, and that the President and the Vice-President have frequently been antipathetic. Obviously, when by unanimous consent a Vice-President is asked to appoint conferees, in 'exercising some discretion,' it were well to show himself discreet.



and on the floor of the Senate, where the amended bill was passed by the decisive and non-partisan vote of 51 to 29. Under such circumstances, it was the view of the press and of the public that Fletcher had packed the group of Senate conferees in order to assure the President's 'getting what he wanted, without delay.' Barkley and Byrnes, both friends of Glass, each offered to resign as conferees in his favor — action which Glass would not countenance. Barkley consented to remain as a conferee only upon the understanding that he should be a free agent, for he resented as humiliating the generally voiced assumption that conferees, thus named by Fletcher, with only face-saving delay would turn their backs upon the Senate amendments and report in favor of the plan of control which the President and Landis were known to favor. The conference report showed 'give-and-take,' but, contrary to the general expectation, it retained the main feature of the Glass amendments. Without a record vote, the report was adopted by both Senate and House, and the law's great regulatory powers were placed in the hands, not of the Federal Trade Commission, but of the newly created Securities and Exchange Commission.<sup>1</sup>

A quandary has repeatedly arisen, when the amendment to which the House has disagreed was one which had passed the Senate by a non-partisan vote, against the recommendation of the committee having the bill in charge. Jefferson's *Manual* cites a distinguished English writer on parliamentary law to the effect that 'the child is not to be put to a nurse that cares not for it.'<sup>2</sup> How shall the Senate majority which passed that amendment be assured of effective representation at the conference?<sup>3</sup> Lodge declared his opinion 'that it must always be the absolute understanding that the conferees represent the views of the Senate and not their own views,' so that they should support the amendment in conference even if they had voted against it in the Senate.<sup>4</sup> Presiding officers have occasionally

<sup>1</sup> Under the Securities Exchange Act of 1934. The conferees were appointed May 14, 1934 (*Cong. Rec.*, 8766). Landis was shifted from the Federal Trade Commission to the Securities Exchange Commission, and in the summer of 1935, upon the resignation of its first chairman, Landis was designated as chairman by recess appointment.

<sup>2</sup> Sec. XXVI, citing 5 Grey, 145; 6 Grey, 373.

<sup>3</sup> March 23, 1906. Teller deplored the modern custom of allowing 'the chairman of the committee, however hostile he may be to the bill as it passes the Senate, to designate who shall deal with the House in the effort to bring the House to the sentiment of the Senate. Everyone can see that logically the friends of the measure are the proper ones to represent the matter to the conferees on the part of the House and win them to the senatorial mind.' Gilfry, *Senate Precedents*, I, 310.

<sup>4</sup> *Ibid.*, 309. When a conference was sought upon the 'Bill to reclassify Postal Employees,' to which the Senate had added as a rider the 'Federal Corrupt Practices Act

avoided the dilemma by naming conferees known to be favorable to the particular amendment.<sup>1</sup> In 1906, the Chair recognized the right of those favoring the joint resolution upon which the United States intervened in Cuba to be represented as the conferees, and they were appointed. Occasionally, to assure loyal representation in conference of a majority favorable to the particular proposition at issue, the motion has been made that the conferees be appointed by the Senate; but such motions have been withdrawn, so reluctant is the Senate to depart from a custom which in general has yielded good results.<sup>2</sup>

#### NUMBER OF CONFEREES

A committee of conference is usually made up of three members from each House. The House asking for the conference may, however, specify the number it pleases, which is usually duplicated by the other House. But it may name any number it sees fit, since the managers vote by Houses and not as members of a single joint committee.<sup>3</sup> On the Dingley Tariff Bill each House appointed eight conferees. In many cases the Senate has authorized the appointment of but three, though knowing that there were to be five House conferees. In 1903, the President *pro tempore* once appointed five conferees, though the House managers were to be but three, and declared, 'there is no rule which limits the number of conferees to be appointed by either House.'<sup>4</sup>

of 1925,' there was some doubt as to how Moses would vote. He had opposed the amendment, but he was 'heir apparent' to the chairmanship of the Postal Committee, and was named a conferee. He removed all uncertainty by frankly stating: 'I understand my duty as a conferee, namely, to make the best struggle of which I am capable for the amendment in its entirety, as proposed by the Senate.'

<sup>1</sup> Gilfry, *Senate Precedents*, I, 307.

<sup>2</sup> March 23, 1906. Foraker withdrew his motion and allowed the conferees to be appointed in the ordinary way, upon assurance 'that the action of the Senate will be faithfully represented by those who are appointed, although they voted against the main proposition which goes to conference.' (Gilfry, *Senate Precedents*, I, 308-09. In 1905 and 1906, the Senate conferees on Statehood Bills were appointed in accordance with custom, with the result that a minority of those conferees represented the view which prevailed in the Senate. In 1905, no report was presented by the conferees, and the bill died with the Congress. *Ibid.*, 307-08.) In some instances all of the conferees have been named from the members of the majority party, minority appointees having declined to serve. (*Ibid.*, 311.)

<sup>3</sup> *Ibid.*, 302-03. Jan. 28, 1925, the Senate referred to a conference committee the Underwood Bill, authorizing the leasing of Muscle Shoals. The Chairman and the ranking Republican and Democratic leaders of the Committee of Agriculture — the natural selections for conferees — declared their unwillingness to serve. On motion of another opponent of the measure, however, they were named. They then declined to serve, and three Senators favorable to the measure were designated. Prolonged debate preceded the naming of the conferees. *Cong. Rec.*, 2552-63.

<sup>4</sup> Frye, Gilfry, *Senate Precedents*, I, 303.

## 'FREE' OR 'INSTRUCTED CONFERENCES'

It has been held that 'a committee of conference may be instructed, like any other committee,' and in the earlier years the Senate did instruct its conferees in specific terms.<sup>1</sup> But its general practice has been against instructing; and on appeal from a definite ruling of the presiding officer that it was competent for the Senate to instruct the committee of conference, after long and learned debate the Chair's decision was overruled by vote of 11 to 47.<sup>2</sup> Not only is the Senate's general practice against instructing its own conferees, but it has made vigorous protest when the House has sought to bind its managers. Under the joint rule which for more than eighty years governed conference committees, it was provided that they should meet and 'confer freely' upon the reasons of their respective Houses as to the disagreeing votes in controversy. In 1891, the conferees of the Senate declined to confer with the managers on the part of the House, on the ground that the latter 'had come to the conference with their hands tied' by House instructions.<sup>3</sup> The House thereupon resolved to ask for a free conference.<sup>4</sup>

## CONFERENCE PROCEDURE

Conferences are almost invariably held in the Senate Wing of the Capitol in the room of the committee having jurisdiction over the bill.<sup>5</sup> There has been protest against this custom. 'Why should we go there to listen to their reasons for amending our bill, when the House asks the conference and holds possession of the papers?' asked Samuel J. Randall.<sup>6</sup> No chairman is imposed upon the conference;

<sup>1</sup> Edmunds's ruling, quoting from Barclay's *Digest*, March 3, 1873. *Ibid.*, 298.

<sup>2</sup> March 3, 1873.

<sup>3</sup> March 3, 1891, *Senate Journal*, 219. Gilfry, *Senate Precedents*, I, 300.

July 28, 1886, Dawes, Frye, and Allison protested against House instructions. Said Dawes: 'If this precedent is established, or if this method of instructing conferees, going into what is called a full and free conference, is in a single instance yielded to, the whole matter of conference between the two Houses ought to be abandoned and will be abandoned.' The Senate voted to insist upon its amendment, 'including the clauses referred to in the message of the House,' and to agree to the further conference asked for by the House. (*Cong. Rec.*, 7617-28.) In 1927 the conference upon the Branch Banking Bill was stalled because the House conferees were bound by an overriding instruction on the most important feature at issue. This made necessary the conferees' reporting a disagreement. Thereupon the House receded from its most unacceptable contention, and at a later conference an agreement was reached. Jan. 25, 1927, *ibid.*, 2223.

<sup>4</sup> See distinction between a 'free' conference and a 'simple' (strict or specific) conference, as phrased by Vice-President Hamlin, and by Speaker Reed, cited by Gilfry, *Senate Precedents*, I, 282, 283.

<sup>5</sup> *Ibid.*, 283.

<sup>6</sup> Lindsay Rogers, *North American Review* (March, 1922), 304.



the first-named manager in the Senate and in the House is often referred to as chairman of his section. Conferences are usually held with closed doors. In rare instances members of Congress have been permitted to appear before conference committees to make statements, and during the consideration of the Statehood Bill in 1906 the conference committee held formal hearings, admitting attorneys and individuals to make arguments as to matters of difference.<sup>1</sup> In July, 1935, the House and Senate deadlocked on the 'death-sentence' feature of the Administration's Holding Company Bill. To the conference committee the chairmen brought two of the Administration's counsel who had collaborated in drafting the bill. Several of the House conferees protested against this bringing of outsiders into the conference. They insisted that the conference should either be closed, or it should be open, not merely to the defenders of the Administration's bill, but to opponents as well. They 'walked out of the conference' and their spokesman got the House to authorize its conferees to exclude outsiders from the conference.

Limitations upon the action of the conferees are imposed, not merely by attempted instructions, but by the rules and precedents of the two Houses. Thus, as Speaker Clark declared, from repeated rulings 'it is as familiar as the multiplication table that the conferees may not include in their report subjects not within the disagreements.'<sup>2</sup> If two sums of money are named in an appropriation bill or two rates in a tariff bill, the conferees may oscillate as much as they please between the two extremes,<sup>3</sup> but they cannot go above or below them.<sup>3</sup> The conferees may not change the text agreed to by both Houses, but they may 'perfect' propositions committed to them by germane amendments.<sup>4</sup> As to the introduction of new matter by the

<sup>1</sup> April 23 to 25, 1906. Gilfry, *Senate Precedents*, I, 283.

<sup>2</sup> This, however, has sometimes been authorized by concurrent resolution of the two Houses, as was done Feb. 27, 1901. Allison cited this resolution, March 2. *Senate Journal*, 252-55.

<sup>3</sup> He declared that when the Payne Tariff Bill was in conference, the House rate on shoes being 15 per cent and the Senate rate 20 per cent, when President Taft notified the conferees that if they did not cut the rate to 10 per cent he would veto the bill, the House passed a resolution in order to enable the conferees to cut the rate to 10 per cent. March 2, 1915, *Cong. Rec.*, 5201, 5208; Gilfry, *Senate Precedents*, II, 115-16.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 330-31. Professor Rogers cites Senator Nelson, in 1916, as saying that from his point of view a certain amendment was 'bad and vicious,' but he added: 'We might let it go in and eliminate it in conference.' Rogers comments: 'The chairman may add an apparently immaterial amendment for the express purpose of differing from the other House, and thus securing the opportunity in conference to add matter, *germane to the amendment*, and consequently proper under the rule, which he did not desire to present in open session.' The conference committee wrote a new bill

conferees, great laxity was tolerated in the early years: In 1836, the Senate and the House agreed to a report recommending the adoption of three new sections; in 1843, to substituting an entirely new bill, and the next day to a report submitting a substitute which included a general legislative provision.<sup>1</sup> But recent rulings have been against such exceeding of their authority by conferees.

In the conference the managers on the part of each House vote separately, the majority in each group determining the attitude to be taken thereby toward the propositions presented by the managers from the other House.<sup>2</sup> The signatures of the majority of the managers on the part of each House are sufficient. Occasionally minority members have refrained from signing or have registered objections with their signatures.<sup>3</sup>

In the Senate the presentation of reports of conference committees are always in order, except when the *Journal* is being read or a question of order or a motion to adjourn is pending, or while the Senate is dividing; and when received, if the question of proceeding to the consideration of the report is raised, it must be immediately put, and determined without debate.<sup>4</sup>

Until nearly 1850 the Senate acted separately upon the several recommendations of the conference report, voting upon motions to recede, insist, or adhere as advised in the report.<sup>5</sup> But for many years the general practice has been to vote on the question of agreeing to the formal signed report from the committee of conference as a single proposition. Bills have often been recommitted to the committee of conference, occasionally with instructions;<sup>6</sup> but in recent years

in the case of the Tariff of 1883. Despite the recent prohibitions of such action, 'sometimes curious things happen. The conference report on the War Revenue Bill of 1918 exempted congressional salaries from the 8 per cent tax on incomes in excess of \$6000. This was new legislation, but it went through both branches almost unnoticed — at least, as far as appeared in the debate.' 'Conference Committee Legislation,' *North American Review* (March, 1922), 303.

<sup>1</sup> Gilfry, *Senate Precedents*, I, 338, 339.

<sup>2</sup> *Ibid.*, 303.

<sup>3</sup> April 23, 1858, on the conference report on the bill for the admission of Kansas was endorsed: 'W. H. Seward, manager on the part of the Senate, and W. O. Howard, manager on the part of the House, do not agree to the foregoing report.' *Cong. Globe*, 1758-63.

<sup>4</sup> Rule XXVII, sec. 1. Cleaves's *Manual*, par. 36, and note. 'It has been held in the Senate that the presentation of a conference report includes its reading, unless by unanimous consent the reading is dispensed with.' 54th Cong., 1st sess., *Cong. Rec.*, 5511.

<sup>5</sup> For 1847 illustration, see Gilfry, *Senate Precedents*, I, 346.

<sup>6</sup> In 1876 there were five successive committees of conference, with gradually changing personnel, on the legislative appropriation bill. The first was named June 15; the

motions to recommit with instructions, like motions to instruct the conferees at the time of their first appointment, have been often and consistently ruled to be out of order.<sup>1</sup>

There have been three pronounced differences in the practice of the two Houses in dealing with conference reports. In the Senate such reports have often been referred to committees;<sup>2</sup> but in the House Speaker Reed ruled that 'a conference report cannot be referred — it must be accepted or rejected.'<sup>3</sup> In the Senate scores of conference reports have been laid on the table.<sup>4</sup> This used to be done also in the House, but under its more recent practice the motion to lay a conference report on the table is not entertained.<sup>5</sup>

#### THE INTRODUCTION OF 'NEW MATTER'

By far the most important difference in the practice of the two Houses in dealing with conference reports has been in regard to the introduction of new matter. The House early took the drastic position that the point of order might be made against a conference report that it contained new matter, and that, therefore, the report might be thrown out on the point of order without a vote. In the Senate, on the other hand, it was formally held — the Chair's ruling being sustained by Senate vote — 'that under the rules and practice of the Senate a point of order did not lie against a conference report, that the only vote possible was on the acceptance of the report, . . . and that there was nothing else open to the Senate.'<sup>6</sup> Both within and without the Senate strong criticism has been directed against the Senate practice which in effect encouraged conferees to exceed the authority given them by introducing new matter into their report, which might secure a majority's approval in the Senate, and thus put

fifth, Aug. 12. Senator Morrill served through the first three; Representative Randall was the only one who served throughout the five. Gilfry, *Senate Precedents*, I, 367.

<sup>1</sup> For recommittal with instructions, see motion of Trumbull, July 27, 1866. Gilfry, *Senate Precedents*, I, 347. March 3, 1873. Trumbull here raised the point of order, apparently inconsistent with his motion referred to in the above note. See ruling by Vice-President Marshall, October 5, 1914. *Cong. Rec.*, 16167.

<sup>2</sup> Gilfry, *Senate Precedents*, I, 352.

<sup>3</sup> May 5, 1898. A. C. Hinds, *House Precedents*, V, sec. 799, n.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 354-56.

<sup>5</sup> The precedent most cited is that of June 8, 1872, when Hoar's appeal from Speaker Blaine's ruling was tabled. *Cong. Globe*, 4460-61.

<sup>6</sup> H. C. Lodge, in debate of Feb. 14, 1907, Gilfry, *Senate Precedents*, I, 335. Vice-President Hobart had held, July 21, 1897, that 'it was not in the province of the Chair during the progress of its presentation to decide that matter has been inserted which is new or not relevant, but that such questions should go before the Senate when it comes to vote on the adoption or rejection of the report.' *Cong. Rec.*, 278.



inordinate pressure upon the House to accede.<sup>1</sup> The 'Salary Grab Act' of March 3, 1873, affords an illustration. When the Legislative, Executive, and Judiciary Appropriation Bill was sent to conference, the record showed that a Senate amendment had been amended by the House so as to fix the salaries of members of Congress at \$6500 each, and that this had been rejected by the Senate. The conference reported a recommendation increasing salaries of members of Congress to \$7500! In the Senate Morrill raised a question of order, that the committee of conference had had no matter of difference on which to confer except the subject of the difference between the then salary, \$5000, and the House amendment's proposal of \$6500, and that they had therefore transcended their powers in recommending \$7500. Vice-President Colfax overruled the point of order.<sup>2</sup> The Senate at once voted to accept the report, the House followed the example, and the bill became a law, carrying the malodorous provision which provoked such popular resentment that it was repealed by the next Congress.

Even as late as 1913 the Senate sustained the ruling of the President *pro tempore* that a point of order could not be made against a conference report wherein new matter had been agreed to, but that such matter might be considered by the Senate itself upon the question of agreeing to the report.<sup>3</sup> A year later, however, when the Vice-President submitted to the Senate the question of order that a certain section in a conference report was 'wholly new matter; that it was never, in word or in substance, considered in either House; that it does not appear in the bill either as it passed the House or as it passed the Senate, and that by including it in their report the conferees had exceeded their authority,' the Senate, by a vote of 26 to 23, decided that the point of order was well taken, and Vice-President Marshall ruled that the report of the committee of conference be referred to the committee with the statement on the part of the Senate that the conferees had exceeded their authority.<sup>4</sup> Four years later the

<sup>1</sup> This point is well developed, with excellent illustrations, by Lindsay Rogers, *North American Review* (March, 1922), 215; 305. House Rule XX, cl. 2, adopted in 1920, requires that Senate amendments (of the type that have given most trouble, on appropriation bills) must be brought back to the House for a separate vote on every such amendment. This rule probably enabled the House to prevent the forcing through of the Senate's Muscle Shoals amendment to the Sundry Civil Bill at the last session of the 66th Congress. It involved \$10,000,000.

<sup>2</sup> *Cong. Globe*, 2171.

<sup>3</sup> *Cong. Rec.*, 5316-18.

<sup>4</sup> Oct. 9 and 10, 1914, *Cong. Rec.*, 16351, 16352, 16372, 16407. Lane's point of order was thus stated by the Chair.

Senate adopted what one of its members characterized as 'the most drastic rule known to English-speaking parliamentary bodies,' which forbids conferees to insert in their report matter not committed to them by either House, or to strike from the bill matter agreed to by both Houses. If either of these prohibitions is disregarded, 'a point of order may be made against the report, and if the point of order is sustained, the report shall be recommitted to the committee of conference.'<sup>1</sup>

#### CONFERENCE COMMITTEE ABUSES; SUGGESTED REMEDIES

Some progress has been made in remedying defects in conference procedure which have brought reproach upon Congress. The Senate seems to have abandoned its earlier practice of requesting a conference before the House had dissented to the Senate's amendments. The Senate's adoption of the so-called 'Curtis Rule' as to the point of order against new matter in conference reports has raised the Senate's standard in this regard to that of the House, and removed a legitimate ground for reproach, although some degree of evasion has still been found possible under the rule. Yet there remain conditions which warrant the charge that 'important laws passed by Congress are really written in secret by a small group of conferees whose decision is final as to what should go into the bills.'<sup>2</sup>

The most important of these conditions, as they have been canvassed in the Senate, are three:

(1) The power of the managers to delay the conference report till so late in the session that the question in disagreement cannot be given close scrutiny because of lack of time. In 1919, Senator La Follette vigorously denounced these abuses. He declared that the then pending bills — 'disposing of all the resources that would furnish heat and energy to the people for all time to come' — had been acted on the past year and the year before in the respective bodies of Congress.

But this conference report comes in here at the last hour of the two-year period of this Congress, and at a time when the Senators are obliged to give their attention to other legislation of the most vital importance, thus putting the Senate in much the same position as a jury when the judge locks them up on bread and water to force an agreement against the judgment of the jury. It is a coerced judgment.

We need a rule that in the short session all bills originating in either

<sup>1</sup> Rule XXVII, cl. 2, adopted March 8, 1918, *Cong. Rec.*, 3179-80.

<sup>2</sup> Lindsay Rogers, *North American Review* (March, 1922), 301.

House shall be sent to the other House not later than the 10th of January, and that after that period no legislation shall be received.<sup>1</sup>

The ratification of the Twentieth Amendment has eliminated the 'short session' and lessened the pressure under which many of the worst abuses of the conference committee have been perpetrated. It may still be desirable to make provision that beyond a fixed date no bill shall be received from the branch in which it originates, unless by a special vote — two-thirds or three-fourths.<sup>2</sup>

(2) A second unfortunate condition, clearly pointed out by critics within the Senate, is that the method of appointing conferees tends to assign tremendous powers over legislation to a small group, unrepresentative of Senate opinion, not only upon the specific issue in controversy between the two Houses, but even upon legislative policy in general. In both Houses the selection of conferees has become practically automatic. It has been a matter of surprise and comment in each House when the traditional three managers have included any others than the chairman, the ranking majority and the ranking minority members of the committee having jurisdiction over the given measure. Especially in the Senate the operation of the seniority rule assigns most of the chairmanships of major committees — and hence the positions as conferees on the important bills which they handle — to a small group of these elder statesmen.<sup>3</sup> In the Sixty-Fifth Congress, April 2, 1917, to March 3, 1919, there were appointed 105 conference committees. Five Senators served on 62 of these as follows: Smoot, 13; Warren, 23; Nelson, 11; Lodge, 9; Penrose, 6.<sup>4</sup> To prevent such concentration, as early as 1919 Senator Norris proposed an amendment to the Senate rules providing that no Senator be a member of more than two of the ten major committees, and that no chairman of one of those committees be appointed on a conference

<sup>1</sup> March 1, 1919, *Cong. Rec.*, 4706 ff.

It was the irony of the situation that this speech, in which La Follette was denouncing the abuse of conference committee procedure, according to Shafroth was part of a deliberate filibuster by which La Follette prevented the enactment of a measure which had been approved in the House by a vote of three to one and in the Senate by a vote of two to one. *Ibid.*, 4716.

<sup>2</sup> Washington's midsummer heat and humidity may end the session. In the last week of August, 1935, Congress had been in session since January 3, and forty members were said to be out of health. Seven vitally important bills were still 'stewing' in conference committees, and hasty compromising became inevitable.

<sup>3</sup> Compare with Call's resolution of March 16, 1882: 'No Senator shall be a member of more than one of the following committees, except by special resolution of the Senate.' *Cong. Rec.*, 1947.

<sup>4</sup> Lindsay Rogers, *op. cit.*, 303.



committee on any bill reported by any one of those committees unless it be reported by the committee of which he was chairman. After consideration at a Republican conference and reference to a committee, this resolution was agreed to after discussion in a later Republican conference, by whose direction it was introduced in the Senate, May 23, 1919, by Lodge.<sup>1</sup> It was then referred to the Committee on Rules, from which it has never emerged.<sup>2</sup> When the Senate really comes to disapprove of the dominance of legislation by a small group of senior Senators, some such remedy is in its own hands.

(3) A third condition which calls for correction is the scant opportunity for the Senate — and still less for the public — to know what goes on in the conference room, or to appraise the merits of the compromises there worked out before they must be accepted or rejected as a whole by the Senate. To require that conference committees conduct their labors in open session with record votes would certainly make their task of adjustment much more embarrassing and more difficult, but it would check some of the absurd if not unworthy dickering which goes on behind closed doors.<sup>3</sup>

When the report finally comes before the Houses, what chance is there, especially in the hectic closing hours of the Congress, for members to decide whether they ought to agree to the concessions that have been made? The House requires that the report be printed in the *Record* before it is acted upon, unless it is presented in the last six days of the session.<sup>4</sup> Since 1880 a House rule has further required that the House conferees shall accompany their report with explicit and detailed explanations in writing.<sup>5</sup> The Senate rule does not

<sup>1</sup> Senate Resolution 36, May 23, 1919, *Cong. Rec.*

<sup>2</sup> Jan. 11, 1922, Norris summarized the history of this resolution. (*Cong. Rec.*, 1062.) He has told the writer that the resolution was taken into the Republican conference contrary to his wishes, for he anticipated that it would be sidetracked by the conservatives. The 'Norris Rule' (especially the feature limiting an individual Senator's assignments on 'major committees' to two) is sometimes mentioned in Senate debate as being applied 'in spirit,' when the committee lists are made up, but Norris says it is applied only when its application satisfies the party organization.

<sup>3</sup> Senator Hoar told with gusto of one absurd dicker. The question in conference was as to the purchase of five collections of historic documents. In the House the appropriation for every one of them had been stricken from the Sundry Civil Appropriation Bill. In conference, the Senate managers insisted on all; the House managers, on none. At last they compromised, agreeing to take them alternately. 'In this lottery the Franklin Papers were saved, and Mr. Sherman's Rochambeau Papers were stricken out, much to his disgust. But he got an appropriation for them later.' *Autobiography*, II, 99.

<sup>4</sup> Rule XXVIII, cl. 2.

<sup>5</sup> Rule XXVIII, cl. 1 b. For interpretation see Hinds, *House Precedents*, V, secs. 6504-15.

specifically require either of these safeguards, but Senate custom, rarely varied except at the end of a session, requires that conference reports go over for at least one night, and the motion to that effect is often coupled with the requirement that they be printed.<sup>1</sup> Senator La Follette made strong protest against this failure to secure publicity, pointing out that a conference report may give away all the precious heritage of our national resources and be forced to a vote in the Senate under conditions that make impossible a study of its terms and probable effects. 'It need not be printed, though forty pages long.'<sup>2</sup>

As Professor Rogers says:

Government by conference committee is never so unpopular that the people get at all excited over it, and, indeed, practically the only criticism of this secret method of agreeing on, and, many times, preparing new legislation, comes from Congress itself. It is there that the revolution should take place.

A reform in these particulars 'would be a material factor in arresting the decline of congressional influence.'<sup>3</sup>

<sup>1</sup> Gilfry, *Senate Precedents*, I, 354-57.

<sup>2</sup> March 1, 1919, *Cong. Rec.*, 4706 ff. As an example of the rush of the final days of the session, Rogers cites: 'When the second session of the Sixty-Sixth Congress came to an end, June 5, 1920, President Wilson had not signed 11 measures. Nine of them had been sent to him the same day. Three appropriation bills were presented to him on June 4 and two on June 3, and 46 other laws were signed on the last day of the Congress.' *Op. cit.*, 306.

<sup>3</sup> Rogers, *op. cit.*, p. 307.

REFERENCES

---

- Bryce, James. *The American Commonwealth*. New York.  
Luce, Robert. *Legislative Procedure*. Boston, 1922.  
McConachie, Lauros G. *Congressional Committees*. New York, 1898.  
Pepper, George Wharton. *In the Senate*. Philadelphia, 1930.  
Reinsch, Paul S. *American Legislatures and Legislative Methods*. New York, 1907.

## GENERAL REFERENCES ON CONFERENCE COMMITTEES

- H. H. Gilfry, *Precedents of the United States Senate*, I, 275-385; II, 114-24.  
Asher C. Hinds, *Precedents of the House of Representatives*.  
Thomas P. Cleaves, *Manual of the Law and Practice in Regard to Conferences and Conference Reports*, and *Jefferson's Manual* (both printed in the *Senate Manual*).  
Lindsay Rogers, 'Conference Committee Legislation,' *North American Review*, March, 1922, 300-07.  
Ada C. McGown, *The Congressional Conference Committee*, New York, 1927.

The services of committees of conference are most in requisition to harmonize differences between the two branches of Congress as to appropriation and revenue bills. These are discussed more in detail in Chapter IX, 'Senate Influence in Financial Legislation.'



# VII

---

SENATE RULES AND PROCEDURE

---

---

★

Each House may determine the Rules of its Proceedings.

UNITED STATES CONSTITUTION

I have begun a sketch, which those who come after me will successively fill up, till a code of rules shall be formed for the use of the Senate, the effects of which may be accuracy in business, economy of time, order, uniformity, and impartiality.

THOMAS JEFFERSON

*Preface to Manual of Parliamentary Practice*

Rules are never observed in this body; they are only made to be broken. We are a law unto ourselves.

JOHN J. INGALLS

Under these century-old rules, for which there is often a fine disregard, the Senate still transacts its business, largely by unanimous consent, and with a consideration for the wishes and convenience of each Senator very agreeable to them, although not a little laughed at by an irreverent public.

HENRY CABOT LODGE

---

★

# VII

---

## SENATE RULES AND PROCEDURE

---

### THE FRAMING AND REVISION OF THE SENATE RULES

---

ON THE very first day after the belated appearance of a quorum made possible the Senate's organizing, a committee was chosen to 'prepare rules for conducting the business of the Senate.' Every one of its five members was a lawyer and had had experience in some legislative body. Ellsworth, Strong, and Bassett had been members of the Federal Convention; Lee had served as President of the Continental Congress; Maclay's legislative experience had been confined to a single term in the Pennsylvania Provincial Assembly. There is no record of the deliberations of this committee;<sup>1</sup> its report was presented and considered, April 16, 1789, and apparently without any amendment it was resolved that the nineteen rules submitted in the report 'be observed.'

The House had been more prompt in its action, for, on the very day when the Senate committee was chosen, the House committee, after five days' deliberation, was ready to report. It was a committee of eleven, including members from ten different states, and was fortunate in having as its chairman Elias Boudinot, who had been for

<sup>1</sup> A loose leaf in the first volume of the manuscript of Senator William Maclay's *Journal*, now in the Library of Congress, preserves what was apparently a memorandum of his own proposals. The printing of these proposals under the heading, 'The Rules of Proceedings for the First United States Senate,' on a page preceding the first entry in the *Journal*, has misled some writers into citing them as actual Senate rules. (H. J. Ford, *Rise and Growth of American Politics*, 265; Miss C. H. Kerr, *op. cit.*, 32, 41, and 176.) Some of these proposals (e.g., as to chairmen of committees, p. 294, and absences, p. 347) were so preposterous and so characteristic of Maclay as to make their adoption impossible.



four or five years a member of the Continental Congress, and in 1782 had served as its President. The rules reported by this committee and adopted by the House were logically grouped under four heads: (1) Touching the Duty of the Speaker; (2) Of Decorum and Debate; (3) Of Bills; (4) Of Committees of the Whole House.

The Senate rules were intended for a body which at the time of their adoption had not more than twenty members, and which it was believed would always remain relatively small. Hence many matters, which Boudinot and his colleagues thought must be strictly regulated for a legislative body already of sixty-five authorized members and certain to expand rapidly, were left to the control of that courtesy and deference which it was expected would characterize the small group of Senators in the intimate contacts of the Senate Chamber. Despite the fact that the Senate's membership is now larger by half than that of the House for which the Boudinot rules were drafted, the Senate still cherishes the tradition that in most of their relations its members shall be governed by custom and mutual courtesy rather than by an elaborate code of formal rules. Of the original list of rules the gist of all but three is to be found, in practically the identical phraseology, in the Standing Rules of today.<sup>1</sup>

Since in each Congress the House is newly elected, it has been held that the rules of the House in the preceding Congress cannot without specific adoption be held binding on the new House, inasmuch as such restraint would impair the constitutional right of this House to 'determine the rules of its proceedings.' Hence at the opening of each Congress the House faces the task of adopting the rules by which it is to be governed. This may be disposed of — as it usually is — by the perfunctory adoption of the rules effective during the preceding Congress. On the other hand, this biennially recurring task may start a long and bitter struggle. Thus, at the opening of the Sixty-Eighth Congress (December, 1923), a group of 'insurgents' blocked the organization of the House until they had extorted a pledge that the question of radical change of certain rules should promptly be

<sup>1</sup> Rule II, intended to prevent disturbance or inattention in the Chamber during the daily sessions, was retained for nearly a century; Rule VI, requiring that no motion shall be debated until the same shall be seconded, was retained till 1884; Rule XVIII, as to voting for different sums proposed for the filling of blanks, was dropped in 1884. A change which in its effects proved more substantial than the dropping of these rules was the modification of Rules VIII and IX, in 1806, cutting out the provisions as to the previous question. The original Senate Rules are to be found in the *Senate Journal* of April 16, 1789, and reprinted in Gilfry, *Senate Precedents*, I, 516-17, and in *Cong. Rec.*, LII, 3782.

brought to open debate and decisive vote; and several changes of moment were their temporary gain from this contest.

The Senate, on the other hand, is a continuing body.<sup>1</sup> It first effected its organization April 6, 1789, and there never since has been a time when the Senate as an organized body has not been available, at the President's summons or in accordance with the terms of its own adjournment, for the transaction of public business. The first rules, adopted only ten days after the Senate came into being, have continued in force without reaffirmation until amended or abolished by the Senate. In contrast with notable revisions of the House rules,<sup>2</sup> the few Senate revisions have been significant of no urgent spirit of revolt or reform; they have been authorized when the accumulation of changes through a long series of years made a new codification desirable.<sup>3</sup> Thus, by the revision of March 26, 1806, the list grew from the twenty of 1789 to forty, the more important additions dealing with the regulation of Senate action upon nominations and treaties. The 1820 revision brought the number up to forty-five, but most of the new rules were of trifling importance, the changes being mostly for the purpose of more systematic arrangement and combination of the substance of the old rules. The most significant addition was Rule XXX, formally bringing into the code of rules the provisions as to the choice of standing committees which had been adopted four years earlier. In 1868, the revision not only gathered up the modifications in the rules that had been accumulating for nearly half a century, but it embodied some provisions that evidenced the strain of the war and of the Reconstruction problems. The number of rules increased to fifty-three, the maximum reached in any general revision. Among the more important changes were those intended to prevent general legislation under the guise of amendments to general

<sup>1</sup> Walsh (Mont.) has argued that the Senate rules are equally evanescent with those of the House. See resolution and speech of March 7, 1917. Root strongly set forth the Senate 'as a continuing body.' Feb. 15, 1915, *Cong. Rec.*, 3793.

<sup>2</sup> De Alva S. Alexander, *History and Procedure of the House of Representatives*, chs. IX, X, and XI.

#### CODIFICATIONS OF SENATE RULES

Date	Reference	Number of Rules	Senate Membership
April 16-18, 1789	<i>Senate Journal</i>	20	20
March 26, 1806	<i>Ibid.</i> , pp. 65-66	40	34
Jan. 3, 1820	<i>Ibid.</i> , pp. 61-69	45	46
March 25, 1868	<i>Ibid.</i> , pp. 340-47	53	68
Jan. 11, 1884	<i>Ibid.</i> , pp. 145-60	40	76

To the original list of April 16, 1789, two days later by vote there was 'subjoined to the standing orders of the Senate' a twentieth rule. *Senate Journal*, 16.

appropriation bills (XXX); to regulate special orders (XXXI); and to provide for more careful handling of nominations (XLIII). There is an echo of the passions of the day in the elaborate provisions for calling to order any Senator who in speaking or otherwise should transgress the rules of the Senate. The last of the rules set forth the formalities attending the suspension, modification, or amendment of the rules. The revision of 1884 has met the Senate's wishes so well that in more than two score years no general revision of the rules has been found necessary.

In the Senate *Manual* it appears that of the forty Senate rules of 1884 only twenty have undergone any change in fifty years; and most of these changes belong to the earlier part of the period.<sup>1</sup> Of the entire list of amendments, only five are of any considerable significance — two changes relating to general appropriation bills (XVI); the new provision to bring to a close the debate upon a pending measure (XXII); changes in the list of standing committees (XXV); and the provision to prevent the insertion of new matter in conference reports (XXVII). Most of the other amendments are of trivial importance; eight of them do nothing more than make changes in the list of officials and dignitaries who may be admitted to the floor of the Senate; four relate to details as to 'Morning Business'; and one prohibits 'smoking or the bringing of lighted cigars into the Chamber!'

'The Standing Rules for Conducting Business in the Senate of the United States' comprise a code of forty rules. The House rules number forty-three, and are considerably more extended and detailed, particularly as to the handling of bills and the control of debate. Moreover, it is to be noted that three of the Senate rules — occupying about one-seventh of the entire code — deal with topics that fall entirely outside of the scope of the House's action — Executive Sessions, Treaties, and Nominations. Even more elaborate is the distinct body of rules that the Senate has formulated to govern its procedure in the exercise of its other non-legislative function, the trying of impeachments. These are set forth in twenty-five separate rules, including the various forms adopted for use in the stages of this quasi-judicial process.

A general revision of the Senate rules is much to be desired. There is need of a new codification to bring order and clarity into the patch-

<sup>1</sup> Edition of Senate *Manual*, authorized Dec. 8, 1932. Note, also, that the right to move reconsideration has been extended to any Senator who has not voted; and that there has been eliminated the requirement that all bills and resolutions must be considered by the Senate as in Committee of the Whole.



work of fifty years. Senate rulings and precedents show many uncertainties and inconsistencies. This is due in part to the discontinuity of service in the Chair. The House rules are administered by Speakers chosen to that office only after long experience in the House, but there is no assurance of such training on the part of the presiding officer in the Senate. Vice-Presidents occupy the Chair when they please. Many of them have been both inexperienced and unskillful as parliamentarians. A few years ago a Vice-President 'reversed himself within a week' upon an important point. Hence the importance of trying to reduce the rules to such clarity and consistency that the Vice-President, though he be no parliamentarian, need not err therein.<sup>1</sup>

#### THE SENATE COMMITTEE ON RULES

Not until the Senate found itself unable to dispose of the congestion of business after the Civil War did the Senate feel the need of adding to its list of standing committees a Committee on Rules. In earlier years from time to time select committees had been designated to 'revise the Rules.' In 1874 on motion of Anthony an exceptionally able committee was thus appointed, each of whose members — Anthony, Pomeroy, and Edmunds — had his special project for expediting Senate business; and each of these three proposals in modified form found its way into the Senate rules.<sup>2</sup> December 9, 1874, upon Anthony's motion, a Committee on Rules consisting of three members was added to the list of standing committees, where it has now held its place for more than a half-century. In 1880 its

<sup>1</sup> This paragraph states the views expressed to the writer several years ago by Senator Charles Curtis, later majority leader, and still later Vice-President of the United States and President of the Senate. He added: 'If I had six months' time for the task, I'd like nothing better than to make a revision of the Senate Rules!' Obviously he believed the task calls for more serious and deliberate thought than did his tempestuous predecessor. It is to be wished that he had undertaken the task, for he had a thorough understanding of Senate tradition and temperament as well as of general parliamentary law. For a recent resolution for revision of the Senate rules, see S. Res. 350, Feb. 14, 1927.

<sup>2</sup> L. G. McConachie, *op. cit.*, 302-05, 318-21.

membership was increased to five. From time to time additional members have been assigned to it, until in 1935 it had a membership of thirteen, eight from the majority and five from the minority party.

Its development has been in marked contrast with that of the House Committee on Rules, which under the chairmanship of vigorous Speakers came to exercise a tremendous control over the conduct of the business of the House, particularly over the scheduling of different measures and the restraint of dilatory motions.<sup>1</sup> So galling did this restraint become that the revolting 'insurgents' in 1909 charged that the House 'had degenerated into an assembly serving no other purpose than to register the arbitrary edicts of a too powerful Committee on Rules.' So effective was their attack that they were able to force the replacement of the committee of five, appointed and headed by the Speaker, by a committee of ten (now twelve) of which the Speaker shall not be a member, and which is elected by the House.<sup>2</sup> In later Congresses the effort has been to give to this Committee on Rules great directive power, but to keep it representative of and responsible to the House.

The Senate Committee on Rules has been accorded no such large measure of control. Indeed, most of its activities do not relate to legislative matters at all. It makes rules for the regulation of the Senate Wing of the Capitol and of the Senate Office Building. It supervises the arrangement of rooms for the use of Senators.<sup>3</sup> It assigns committee rooms, has general approval of the heating and ventilating of the Senate Wing, and the control of all matters connected with the Senate restaurant, even to regulating the price of its viands.<sup>4</sup> Aside from these extraneous tasks, Senator Hoar, long a member of this committee, declared that it 'had not, in general, much to do.' In the House, the Committee on Rules has been the agency through which the will of the majority has been quickly carried into effect, under special orders which the committee has reported. In the Senate, where prompt action upon a given measure can usually be secured only by unanimous consent, the influence of the Committee on Rules has been mainly negative — the defeat or more often the indefinite postponement of innovation. Throughout the past generation it has been looked upon by many Senators as little else than 'a

<sup>1</sup> De A. S. Alexander, *op. cit.*, ch. X, 'The Rules and the Committee on Rules,' 180-212. The committee, in a single special order, adopted by a majority, fixed the order of business for sixteen legislative days.

<sup>2</sup> March 19, 1910, *Cong. Rec.*, 3305.

<sup>3</sup> *Senate Journal*, 60-62, Feb. 17, 1909.

<sup>4</sup> *Senate Manual* (1935). Rules for the Regulation of the Senate Wing, 101-09.

graveyard for proposed parliamentary reforms.'<sup>1</sup> Thus the so-called 'Norris Rule' — a proposal that no Senator could be a member of more than two of the ten 'major committees' — though approved by the Republican conference and in accordance with its instructions introduced in the Senate by the majority leader, was then, to Norris's regret, referred to the Committee on Rules, from which it has never emerged.<sup>2</sup> A majority of the Senators probably approve of its principle, but it has been kept out of the rules, so that at any time the party organization that sees temporary advantage in so doing may set it at naught.

In one of the most searching criticisms of the Senate rules ever delivered within the Chamber itself,<sup>3</sup> Senator Stephen M. White said of the Committee on Rules:

That committee creates not, neither does it destroy. It lulls into somnolence all tendered changes. . . . Occasionally a member of the Committee on Rules notes the propriety of reporting back a proposed resolution. The vitalized committee member is informed that he cannot even enjoy the privilege of filing a minority report, because a minority report presupposes the existence of a declaration from the majority, and the majority reports not, neither does it cease to be. . . . Its power of annihilation is effectively manifested in silence, serenity, and solemnity.<sup>4</sup>

In the long session of the Sixty-Eighth Congress (December 3, 1923, to June 7, 1924), the House Committee on Rules presented ten reports and twenty-four special orders, scheduling the procedure for routing some of the most important measures before the House. During that strenuous session the only activity of the Senate Committee on

<sup>1</sup> McConachie, *op. cit.*, 302. Jan. 28, 1929, in debate upon a resolution providing that nominations be considered in open executive session, Dill opposed its being referred to the Committee on Rules because in that case 'we shall never hear from it again.'

<sup>2</sup> May 23, 1919. For further discussion of this proposal, and of its intended application to the membership of conference committees, see pp. 333 and 334, n. 2. Toward the end of the preceding session of Congress, Cummins had reported this proposal back from the then Committee on Rules, declaring that the committee was unanimous in recommending its adoption, and that in his belief no debate upon it would be necessary; but its consideration was blocked by Overman, who was then chairman of the Committee on Rules, and who declared that he favored the proposal, but another Senator 'has requested me to object' — an excellent illustration of one aspect of 'senatorial courtesy.' *Cong. Rec.*, 3744 and 4556, Feb. 19 and 28, 1919.

<sup>3</sup> Jan. 10, 1896, *ibid.*, 551-57, advocating amendments to the rules which had been proposed by Hill, Dec. 11, 1895, authorizing the counting of a quorum; the prohibiting of interruption of a Senator to raise the question of lack of quorum; requiring that that question be not raised oftener than once an hour; and providing a method for securing, if demanded by majority vote, a prompt fixing of a date for final action on a measure that had been debated thirty or more days.

<sup>4</sup> *Ibid.*, 555.



Rules which left a trace on the index of the *Congressional Record* was a single report on 'Radiocasting the Proceedings of Congress.'<sup>1</sup>

### SOME SENATE RULES

---

The present chapter essays no such preposterous task as to comment *seriatim* on all the Standing Rules of the Senate — still less, to set forth the Standing Orders, or to summarize or appraise the thousands of precedents which fill the weighty volumes of Furber and Gilfry.<sup>2</sup> It has seemed to the writer that tedious duplication may best be avoided by discussing some of the more important rules in direct connection with the particular activities to which each applies. Accordingly comments upon the rules that regulate Senate procedure, for example, as to Debate, Appointments, Treaties, Impeachment, and many other topics, have been distributed among the several chapters dealing with those particular subjects. There remain to be discussed in the present chapter rules upon a number of unrelated topics not noted elsewhere.

#### ATTENDANCE

To guard against delay of business because of the absence of members — a frequent cause of embarrassment both in the Continental Congress and in the Congress of the Confederation — the Constitution provided that in each House a smaller number than a quorum might 'be authorized to compel the Attendance of absent Members, in such Manner and under such Penalties as each House may provide.'<sup>3</sup>

In the North Carolina ratifying convention James Iredell declared:  
'When it is known of how much importance attendance is, no Senator

<sup>1</sup> S. Res. 197, *Cong. Rec.*, 7742. In the two sessions of the 70th Congress, the House Committee on Rules presented 12 reports and 39 special orders. Meantime the only index entries during that entire Congress relating to the Senate Committee on Rules are those concerning the election of its members; and the resolution granting to it the power to hold hearings.

<sup>2</sup> George P. Furber, *Precedents*; Henry H. Gilfry, *Senate Precedents*, I, 1789-1913; II, 1913-15.

<sup>3</sup> Constitution, art. I, sec. 5.

would dare to incur the universal resentment of his fellow-citizens by grossly absenting himself from his duty.' <sup>1</sup>

But the dilatoriness with which members of the First Senate convened for its organization proved an earnest of what was later to be experienced.<sup>2</sup>

The first set of rules adopted by the Senate, April 16, 1789, ended with 'Rule XIX: No member of the Senate shall absent himself from the service of the Senate without leave of the Senate first obtained.' From that day to this, the Senate's rule as to attendance has remained unchanged, except that in the revision of 1884 the last two words, 'first obtained,' disappeared. In the view of at least one member of the original Senate, this simple rule was utterly inadequate. Maclay's proposal was as follows:

These Rules shall be engrossed on parchment, and hung up in some conspicuous part of the Senate Chamber. And every Senator who shall neglect attendance during a session, absent himself without leave, or withdraw for more than a quarter of an hour, without permission, after a quorum is formed, shall be deemed guilty of disorderly behavior; and his name together with the nature of his transgression shall be wrote on a slip of paper and annexed to the bottom of the Rules, there to remain until the Senate, on his application or otherwise, shall take order on the same.<sup>3</sup>

The Senate's frequent adjournment for the most trivial reasons can hardly have impressed upon the members the duty of conscientious attendance. One day during the first session Maclay wrote: 'There was now a cry for adjournment to see the balloon, and the Senate rose.'<sup>4</sup> At another time he recorded his disgust that on a Friday the Senate adjourned till Monday to give the Senators an opportunity to attend the President's levee. In November, 1804, the Senate established a notable record for diligence in attendance. On each of three days of one week the Senate adjourned without having made a quorum — for the Senate clock had been moved ahead half an hour! Each day the Vice-President took the Chair promptly at the appointed hour as indicated by that clock, and announced: 'We shall have no quorum; it is best to adjourn.' And that was done

<sup>1</sup> Elliot, *Debates* (1836), IV, 130.

<sup>2</sup> Though March 4, 1789, had been designated for the organization of the new Government, a quorum of the Senators-elect did not appear till April 6. This month of delay found some excuse, so Madison wrote to Jefferson, in the shortness of the interval between the election and the convening of Congress, and the peculiar badness of the weather. Madison, *Works*, I, 458.

<sup>3</sup> Maclay's proposed rules, p. 339, n. 1.

<sup>4</sup> Maclay, *Journal*, Sept. 23, 1789.

— the reason being that 'the Senate Democrats appeared anxious to attend the horse races.' On the fourth day the procedure was as follows:

At 11 o'clock A.M. the Senate met — Mr. Bradley moved that we now go into the consideration of Executive business — Carried. The gallery was cleared and the doors closed — He then said my object in making the motion was that it might appear from the journal that we do some business. — that object is attained — I therefore move that the Senate now adjourn to Monday next. Carried.<sup>1</sup>

In the first age of the government [wrote Benton] no member absented himself from the service of the House to which he belonged without first asking and obtaining its leave; or, if called off suddenly, a colleague was engaged to state the circumstances to the House and ask for leave. In the journals of the two Houses for the first thirty years of the government, there is in the index a regular head for 'Absent without leave.'<sup>2</sup>

This is certainly an idealized picture. Exceptionally conscientious Senators like Maclay would comply with the rule; requests for leave of absence were frequent. In 1807, one Senator boasted that in eighteen years in Congress he had not once been absent from his seat.<sup>3</sup> Nevertheless, absences had already been of such frequent occurrence that the Vice-President astonished the Senators by sharply reproving them for neglect of duty.

The President [Aaron Burr] censured with some severity the members who had left their seats. Mr. Stone said if any notice was to be taken of gentlemen leaving their seats, he hoped it would not be by any other authority than that of the whole Senate. Mr. Burr said if it should happen again, he should take the opinion of the Senate upon it; and that if members wished to absent themselves they must ask leave.<sup>4</sup>

Plumer mentions two Senators who made it a practice to come for a few days early in the session and then without obtaining leave returning home, after collecting traveling expenses, there to remain until near the end of the session when they again appeared in the Senate to collect their pay.

<sup>1</sup> William Plumer, *Memorandum*, 195. John Quincy Adams recorded the passing of this vote, adding: 'Mine was the only voice heard against it. My reason was a natural abhorrence of tricks to save appearances, contrary to the real truth of things.' He acknowledged that there was no business to do. (*Memoirs*, I, 315.) Plumer showed no objection to the early adjournment, 'because the less business is done by Congress the better it will be for the Union. I have never attended the horse races.'

<sup>2</sup> *Thirty Years' View*, II, 170.

<sup>3</sup> Plumer, *Memorandum*, 640, tells this of Baldwin (Ga.), who had served ten years in the House before entering the Senate. From Jan. 29, 1913, to July 1, 1930, Sheppard (Tex.) had been absent but thirteen days from the Senate, and during a period of seven years he had been present at every session.

<sup>4</sup> J. Q. Adams, *Memoirs*, I, 350.



It is not now the practice for Senators who absent themselves to ask liberty of absence. If they did that, their diurnal pay would cease — but now their wages continue as well when absent as present. The practice is, I think, dishonorable.<sup>1</sup>

Benton, whose service in the Senate began in 1821, declared that he could recall 'no instance of leave asked since the last of the early members, the Macons, Randolphs, Rufus Kings,' disappeared. Sixty years later, when leave was asked in behalf of a colleague who was ill, Hoar raised the question whether it was necessary to obtain such leave, to which the Vice-President replied:

Any Senator may do as he pleases about it. . . . The rule is as explicit upon the subject as it can be, requiring a Senator to obtain leave, but it has not been the practice of the Senate to enforce the rule.<sup>2</sup>

In the revision of the rules, two years later, 1884, there disappeared from the rule the two words requiring that leave of absence be 'first obtained.'

A Senator who first entered the Senate in 1907, found it necessary, soon after the opening of the session, to return to his home to finish certain prosecutions on which he was engaged as State's Attorney. Accordingly he called upon some veteran Senate leaders to inquire how he should proceed to obtain leave of absence. They laughed, and told him, 'You just clear out!'<sup>3</sup> In recent years members have absented themselves from the service of the Senate, apparently without the slightest compunction. At times the work of the Senate has been brought practically to a standstill, and the severest criticism of the absentees has been called forth from the press and from colleagues in the Senate. In 1913, disgusted leaders on both sides demanded that the 'farce' of recent Senate proceedings, 'the miserable pretense' of trying to do business without a quorum, be ended.<sup>4</sup> La Follette was the leader in this denunciation of the absentees, yet the previous year he had been cited as 'a continual absentee,'

<sup>1</sup> Plumer, *Memorandum*, 534, Dec. 20, 1806.

<sup>2</sup> June 1, 1882. For House rules and practice as to absences, see *House Manual*, secs. 656, 768-74 (1934). Formal leave of absence is still granted, though rarely requested except by new members. At the special session of the Senate, July 7 to 21, 1930, for consideration of the London Naval Armament Limitation Treaty, Brookhart attended the Senate for the first time on the last day, in time to vote on the treaty and to collect his pay.

<sup>3</sup> Borah told this experience to the writer.

<sup>4</sup> See remarks of La Follette, Cummins, Borah, and Kern, in the debate of Oct. 21, 1913. Said Kern: 'It would be most unfortunate for us to surrender to the absentees and give up work. It would be a confession to the world that the Senate showed 31 Democrats in Washington and 17 absent, and 19 Republicans in Washington and 28 absent.' Two roll-calls on that day brought in only 45.

having 'scarcely been in town this session,' while chasing a presidential nomination. During that session there were two hundred roll-calls to determine the presence of a quorum. La Follette answered to his name on the first day of the session, December 4, 1911, but to no later roll-call till the one hundred and ninth, on July 2. For the entire session his record was forty-nine. A rival was Jeff Davis of Arkansas, who was said 'never to have been in his seat for six consecutive days in six years. During all these years it is not thought he has been out of his home State thirty days.' In that particular session Davis answered to twenty-two of those two hundred roll-calls and Dixon, of Montana, to thirteen.<sup>1</sup> In 1924, after about a month of golfing in Florida in mid-session, when many roll-calls and close votes were often being taken in a single day, Elkins was said to have told a reporter, 'They may telegraph to me as much as they damn please. I'll come back when I get ready.'

It is evident that popular election has not quickened the Senators' sense of duty as to diligent attendance. Indeed, probably no cause has contributed more directly to absenteeism at times when Senators are 'mending their fences' in their own states or chasing delegates' votes the country over. This has become so much a matter of course that one of the leading Progressives intimated that any Senators 'who are engaged in campaigns' ought to be excused.<sup>2</sup>

#### COMPELLING THE ATTENDANCE OF ABSENT MEMBERS

The Senate was barely five years old when the growth of absenteeism led to the choosing of a committee 'to report such rules as may be necessary to compel the attendance of members of the Senate.'<sup>3</sup> In the following year, while Jay's Treaty was before the Senate in special session, even that most momentous issue did not hold Senators to their task. Goodrich wrote to Wolcott:

It has wounded us extremely that no remonstrance or respect for public business have been able to keep Senators and members of our House here for a few days or a week, and, what was not to be expected, that most mismanagement has happened in the Senate.

A year later George Cabot appealed to his Massachusetts colleague thus:

It is distressing to the few of us who remain here that, at so delicate a juncture, when the Senate will be called to act a part, it is *totally*

<sup>1</sup> Washington dispatch of July 12, 1912, to *Worcester Evening Post*.

<sup>2</sup> Kenyon, Sept. 19, 1914.

<sup>3</sup> Nov. 21, 1794, *Journal* 127. Langdon, Izard, and Burr constituted the committee.

uncertain on what side the majority will be found on a question of the most consequential kind. . . . I pray you to come on without a moment's delay, as you would wish to save us from defeat, and our country from disgrace and ruin.<sup>1</sup>

In 1798 the evil became so aggravated that it could no longer be ignored. In May the Senate directed its Secretary 'to write to all such Senators as are absent without leave or whose leave of absence has expired, requesting their immediate attendance.' Before the session ended, the Senate's rule as to absences was so amended as to provide that on any day when a less number than a quorum shall convene, they shall be 'authorized to send the Sergeant-at-Arms or any other authorized person or persons for any or all absent members as the majority of such members present shall agree.'<sup>2</sup>

Neither in this nor in many later rules whereby it was attempted to secure the attendance of absentees was the appeal made alone to the laggard member's sense of duty, but to his 'pocket nerve' as well. The rule of 1798 provided that unless his excuse for non-attendance should be judged sufficient by the Senate, he should bear the expense of sending for him; if the excuse were deemed sufficient, that expense should be paid out of the contingent fund.<sup>3</sup> For nearly forty years (1818 to 1856) the law provided that each Senator should receive a *per-diem* payment covering not only each day of his attendance but also the days when sickness necessitated his absence. In the Act of 1856, which changed the method of pay from a *per-diem* allowance to a salary of \$3000 a year, an attempt was made to encourage steadiness of attendance by a deduction from the salary for any other cause than sickness of the Senator or in his family. But the change to fixed salaries, so Trumbull and Sumner asserted, was soon found to have the unfortunate effect of leading members to hurry home, so that 'we are constantly threatened that we cannot have a quorum of the two Houses, and that business will be put a stop to.'<sup>4</sup> Sumner asked: 'What penalty is too severe for Senators

<sup>1</sup> H. C. Lodge, *Life and Letters of George Cabot*, 95.

<sup>2</sup> June 25, 1798, *Journal*, 517.

<sup>3</sup> Act of March 19, 1816, substituted an annual salary of \$1500 for the *per-diem*, and provided for a deduction, in case of absence, in proportion to the time of absence. But this Act was repealed Feb. 6, 1817. By the law of Jan. 22, 1818, each Senator was to be paid eight dollars for each day of his attendance, and also for such days as he might be detained by sickness on his journey to or from the session, or for such days as he might be unable to attend. See interesting debate on absences, April 12, 1838 (*Cong. Globe*, 302), and the excuses recognized by the resolution of Aug. 2, 1854 (*ibid.*, 2092).

<sup>4</sup> Hale doubted whether there had been any such result from the change from *per-diem* to a fixed salary, but the facts seem to sustain the view of Sumner and Trumbull.



who go away and break up a quorum just toward the close of the session?' To discourage this practice, it was provided that if a Senator, without leave of the Senate, withdrew from his seat before the end of the session, he should forfeit, in addition to the deduction for each day's absence, a further sum equal to the mileage allowed by law for his return home. But when the new law as to salaries was enacted in 1866, it made no provision for deduction for absences.<sup>1</sup>

Some attempt has been made through publicity to shame members into a reasonable steadiness of attendance. In 1864, Fessenden declared, 'The fact of the frequent want of a quorum in this body has become notorious;... it is shameful and discreditable to the body.'<sup>2</sup> Upon his motion a resolution was adopted that in the *Congressional Globe* there should be 'put in a separate list the names of the absentees in each call for ayes and noes.' In 1875, Anthony, 'to economize space in the *Record*, and cost to the government,' urged that the resolution be rescinded. He insisted that the word 'absent' was not only erroneous, but often very unjust, as a Senator's absence might be occasioned by work upon some conference committee. But Conkling, Edmunds, and Thurman favored its retention, as tending to lessen absenteeism. The question was not brought to a vote,<sup>3</sup> and the practice remained unchanged until about 1892 when 'Not Voting' was quietly substituted for 'Absent' as the heading under which to this day are listed the names of Senators who do not take part in a yea-and-nay vote.

Aside from such provisions by statute and by rule for encouraging attendance, the Senate since 1798 has relied upon the Sergeant-at-Arms to secure the presence of Senators in cases when business has been halted by lack of a quorum. In the earlier years the orders

The first long session of Congress, after this change was introduced, was shorter by 71 days than the last one in which members received a *per-diem*. The average length of the long session in the last six Congresses under *per-diem* pay was 265 days, while that of the first three following the change to salary-payment was 203 days, a shortening of two full months.

<sup>1</sup> Act of July 28, 1866.

<sup>2</sup> May 4, 1864, *Cong. Globe*, 2088-90. Trumbull opposed the proposal as 'child's play' and 'trivial.' Hale favored a rule like that in the House, whereby the Sergeant-at-Arms might compel the attendance of absentees. Collamer declared the result of such a summons would be that the Senators will 'come in if they choose, and when they get in help to adjourn us. That will probably be the effect of it, and the proceeding ends and always has ended in the other House in a broad farce, a general horse-laugh. The only result is a great loss of time.'

<sup>3</sup> Miss C. H. Kerr, *op. cit.*, states that this rule 'was repealed in 1875' — an error due to mistaking a motion to consider this motion for one to adopt it. (Feb. 24, 1875, *Cong. Globe*, 1669.)

to him were couched in peremptory language: — he was forthwith to ‘summon and command the absent members to be and appear before the Senate immediately’ and to ‘take all practicable means to enforce their attendance.’<sup>1</sup> In the middle of the century, as Hale said, the Senate’s order was ‘generally put in an exceedingly cautious, guarded and modest shape: that “the Sergeant-at-Arms be directed to request the attendance of absent members.”’<sup>2</sup> As late as 1872 a motion, in the absence of a quorum, that the Sergeant-at-Arms ‘compel the attendance of absentees’ was ruled out of order on the ground that, inasmuch as the Senate had made no provision in its rules for compelling the attendance of absent members, it was not in the power of a minority of the Senate to change the existing rule on the subject.<sup>3</sup> The obstacle was removed by the Senate’s adopting the rule which provides that if at any time during the daily sessions of the Senate the question shall be raised as to the presence of a quorum, the roll shall be called and the result announced, and these proceedings shall be without debate. If the roll-call discloses the absence of a quorum,

a majority of the Senators present may direct the Sergeant-at-Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution and until a quorum shall be present, no debate nor motion, except to adjourn, shall be in order.<sup>4</sup>

In 1922, in spite of the Republicans’ great majority in the Senate, absenteeism became so prevalent as to call forth the severest criticism from the press, while within the Chamber opponents taunted the

<sup>1</sup> May 21, 1826, *Senate Journal*, 402.

<sup>2</sup> In debate, May 4, 1864.

<sup>3</sup> April 20, 1872, *Cong. Globe*, 2627, 2629. The Constitution’s provision is: ‘A smaller number [than a quorum] may be authorized to compel . . .’

<sup>4</sup> Before the adoption of this rule, it had been held that pending the execution of the order to the Sergeant-at-Arms, even a motion to adjourn could not be entertained. The question as to what would then be in order meantime led to the following colloquy:

Pugh: Nothing.

Toombs: Nothing, until we bring in the absent members. . . . All we can do now is to wait for those members who are absent, and let those who are here speak if they choose.

Fessenden: Suppose we do not want to speak?

Toombs: We can sit and quietly take a doze.

Fessenden: I think that is the best thing that we can do.

Must the Sergeant-at-Arms first be directed to request before being directed to compel the attendance of absent Senators? In 1879 by a vote of 24 to 12 the Senate determined this question, arising under the old rule, in the affirmative. (Feb. 24, 1879, *Cong. Globe*, 1844, 1847, 1848.) When the point was raised in 1915, under the rule in its present form, Williams declared: ‘The Senate has never ruled that you could not compel until after you had requested,’ and the Presiding Officer (Ashurst) ruled that it was in order to compel the attendance of absent Senators before requesting them to return. (Feb. 8, 1915, *Cong. Rec.*, 3276.)

majority with not daring to support their own measures. The party leaders found the situation humiliating and at a conference, on motion of the Republican whip, adopted a resolution declaring that 'there is and has been much larger absenteeism than is justified under existing circumstances,' and instructed the chairman to notify absentees in Washington and elsewhere that they at once return to their duties. It was further resolved 'that if the absentees fail or refuse to report for duty at once, proper steps be taken to have the Sergeant-at-Arms compel the attendance of such Senators.'<sup>1</sup>

May the presence of a Senator be compelled only in case a quorum is lacking? July 5, 1797, by order of the Senate the Vice-President, Jefferson, by letter sent notice to William Blount: 'You are hereby required to attend the Senate in your place, without delay.' Although the Doorkeeper returned the letter, 'as on inquiry he [Blount] could not be found,' the absentee later attended the Senate.<sup>2</sup>

May the Senate issue an order to compel the attendance of absent Senators after the presence of a quorum has been disclosed? In 1893, President *pro tempore* Manderson ruled that it was competent for the Senate to order the attendance of absent members when a quorum was present, it being a right inherent in every legislative body to compel attendance of members who are not present for duty and who have not been excused.<sup>3</sup> In 1914 the same question was raised when the Sergeant-at-Arms returned to the Senate Chamber and reported that a certain Senator, to whom at his residence the Senate's order had been read, 'refused to come, as he ascertained that a quorum was present.' In response to the officer's request for instructions in this particular case, the presiding officer declared that the fact of the Senator's ascertaining that a quorum was present was irrelevant, and, citing 'an inherent right in this body to compel the attendance of absent members in order to have a quorum present,' he instructed the Sergeant-at-Arms to compel the attendance of absent members.<sup>4</sup>

'By what compulsion must I?' has in effect been the reply which truant Senators have often made to the summons for their appearance in the Senate Chamber. In 1858 the Chair declared that he did

<sup>1</sup> *New York Tribune* account of the meeting, inserted in *Cong. Rec.*, May 26, 1922. May 25, while the tariff bill was under consideration, of the 60 Republican seats only four were occupied; later, 54 Republican seats were vacant during debate on the Anti-Lynching Bill. During both these periods the Democrats were filibustering.

<sup>2</sup> Pages 863-64.

<sup>3</sup> March 3, 1893, *Cong. Rec.*, 2535.

<sup>4</sup> Sept. 19, 1914.



'not see any penalty provided.'<sup>1</sup> Deductions from *per-diem* compensation and publicity have proved but slight deterrents, and the excuses rendered have indicated no serious apprehension of censure. When Senators, summoned by the Sergeant-at-Arms, came straggling into the Chamber at four o'clock on a winter morning, and the motion had been made that 'the absentees who are present (*sic*) be called upon for their excuses for neglecting the business of the Senate,' Houston took the floor and said: 'I am one of the absentees, and I should like to know what excuse the Senate has to make to me for disturbing me in my peaceful bed, at this hour?' (Laughter.)<sup>2</sup> The evening of February 23, 1883, in making his report the Sergeant-at-Arms stated: 'A number of Senators are reported to be at dinner at Senator Chandler's, where the host refused admission to the officers sent to notify them.' After futile efforts to reach a vote to compel the attendance of named Senators, at 10 P.M. the Senate adjourned without action. Between 4.30 and 6.20 on the morning of January 16, 1891, the Sergeant-at-Arms made four reports of his efforts, as directed, 'to use all necessary means to compel the attendance of absent Senators.' He said that he 'found Senator Berry in the cloakroom of the Senate, who requested me to report to the Senate that he would come when he got ready. Also found Senator Butler in the cloakroom, who refused to obey the summons.' At 9.30 A.M., following this all-night session, a quorum was at last secured.<sup>3</sup>

Of course the Senate might, if it chose, deal sternly with cases of recalcitrancy. Following the announcement of one Senator's refusal to leave his house at summons of the deputy, this debate occurred:

Chamberlain: When a Senator appears at the door and refuses to come, why does not the Sergeant-at-Arms bring him here forcibly?

Presiding Officer: The Chair is not able to answer that question.

Williams: When a Senator has been served and refuses to come, he has committed a contempt of the Senate, and has rendered himself liable, when he does present himself at the bar of the Senate, to such penalty as the Senate shall choose to visit upon him.<sup>4</sup>

Walsh quoted with approval Speaker Crisp's ruling that 'the House had the right to have every member present — that if but one or two members were absent, it could send for them, if it should desire.'<sup>5</sup>

<sup>1</sup> March 15, 1858, *Cong. Globe*, Appendix, 119.

<sup>2</sup> *Senate Journal*, 405, Feb. 23, 1883.

<sup>3</sup> *Ibid.*, 81, Jan. 16, 1891.

<sup>4</sup> Sept. 19, 1914.

<sup>5</sup> Feb. 9, 1915, *Cong. Rec.*, 3329.

From time to time the indignant Senate has debated drastic orders,<sup>1</sup> and in a few instances Senators have been haled back a long distance to attend to their duties in the Chamber. But for the most part the Senators in attendance — perhaps mindful of personal or political exigencies in which they may later find themselves — have shown an easy-going indulgence toward the truants, particularly toward those who have 'had campaigns on their hands.'<sup>2</sup>

In justifying his absence, many a Senator has emphasized the fact that Rule V forbids a member's being absent without leave, not from the Senate Chamber, but 'from the service of the Senate.' In 1838 Henry Clay opposed a resolution for deducting from the *per-diem* allowance 'the number of days any Senator may hereafter absent himself from the Senate without first obtaining leave, unless he may be unavoidably detained from his seat by his own sickness.' He insisted that absence from the Chamber did not imply neglect of public duties.

He did infinitely more in his room than he did in the Senate Chamber, for he was at work there night and day, either reading, digesting or preparing matters in connection with his public duties. . . . Public business would be often more expedited by attending more at home, or in the committee rooms.<sup>3</sup>

Certainly no sane observer of the Senate would award the palm for statesmanship on the mere record of the number of hours each member has spent in the Senate Chamber. He would recall one and another of the ablest men in the Senate, who often are not present at ordinary sessions, or who stay for only a few moments to catch the drift of the discussion, but who, when serious business is forward, can always be relied upon to be present, well equipped for service. Committee meetings and hearings — particularly in these days when the number of investigations is legion — make imperative calls to 'the service of the Senate,' on the part of many members, outside of the Chamber.

<sup>1</sup> Feb. 8, 1915, the Senate debated this proposal: 'Until otherwise ordered by the Senate the following shall be a standing order of the Senate: All Senators are required to appear forthwith in the Senate Chamber, and to remain in the Chamber until excused by the Senate. Any Senator disobeying this order shall be in contempt of the Senate, and shall be brought to the bar of the Senate and dealt with as the Senate may order.' Colt declared this proposed order 'absolutely non-enforceable upon its face.' It was laid on the table.

<sup>2</sup> Kenyon's remarks, Sept. 19, 1914.

<sup>3</sup> April 13, 1838, *Cong. Globe*, 302 ff. Benton favored the proposal, arguing that public business was detained by the absentees. White opposed it on the ground that it seemed to imply that a Senator had a right to be absent, provided he relinquished his pay for that time. In view of the strong opposition, the resolution was withdrawn.

The result is that the visitor in the gallery at a routine session may look down upon few others than the Presiding Officer, the diligent scribes, the Senator who has the floor, his most eager opponent upon the pending issue, the majority leader, and a scattering of Senators whose responsibilities are lightest.<sup>1</sup> Not a few members would best increase their efficiency and influence by following Clay's precept and example in spending more time at their office desks in 'reading, digesting, and preparing matters connected with their public duties,' rather than in attendance in the Chamber, either making or listening to the rambling, incoherent speeches upon which the Senate Rules place no restraint, and in which light-weight Senators often find their chief delight.

#### THE QUORUM

A Majority of each [Branch] shall constitute a Quorum to do Business. (Constitution, art. I, sec. 5.)

For many years the interpretation of the phrase 'a majority of each (branch)' remained uncertain. Did it mean a majority of the number of Senators to which all the states then in the Union were entitled? or a majority of the number chosen and living at the given time? or a majority of those who had been not only duly elected but were living and had been sworn in? In the early Congresses the precedents were contradictory. After the outbreak of the war in 1861 had caused a large number of constituencies to refuse to elect Representatives, the interpretation became a matter of great potential importance.<sup>2</sup>

The House then promptly reached the decision that its quorum consisted of a majority of 'those chosen.'<sup>3</sup> The Senate held the question open. Not until May 4, 1864, did it decide that 'a quorum of the Senate shall be a majority of the Senators duly chosen.' But this proved unsatisfactory, for it left undetermined the status of those who might have been elected but who had not been inducted into the Senate. Accordingly the definition was changed to the form which now stands in the rules, 'A quorum shall consist of a majority

<sup>1</sup> The 'thin' attendance in the Chamber may be in part a consequence of the splendid accommodations which since 1909 have been provided for each member in the Senate Office Building, where he can work at his desk, ready to respond to any summons from the Chamber. A tiny subway car provides rapid transit between the two buildings.

<sup>2</sup> The early precedents were fully cited in the debate of July 9, 1862, *Cong. Globe*, 3191.

<sup>3</sup> For House action upon the question of quorum, see De A. S. Alexander, *op. cit.*, 156-57; *House Manual* (1923), 17-19.



of the Senators duly chosen and sworn,' and the House has now confirmed its definition of 'quorum' to that thus adopted by the Senate.<sup>1</sup>

For many years prior to the last decade of the nineteenth century at the opening of the first session of a Congress it had been customary for the Presiding Officer to direct the Sergeant-at-Arms to ascertain whether a quorum of the Senate was present. Since that time, at the beginning of each regular and extraordinary session of Congress with hardly an exception the practice has been at once to determine the presence of a quorum by a roll-call of the Senate. In the daily sessions of the Senate its business goes forward unless and until the question of the presence of a quorum is raised. It is said that on one recent occasion when the gavel fell and the Chaplain's prayer was uttered, the majority leader, Senator Curtis, was the only member upon the floor.<sup>2</sup> As soon as the question of the presence of a quorum is raised, the Secretary is directed to call the roll. Bells ring, and from the coat room, the Marble Room, the restaurant, the Office Building, members come straggling to their seats. If Senators fail to reach the Chamber in time to answer to their names, at the end of the call they remain standing until, the presiding officer having recognized each in turn by naming his state, the Secretary again calls his name. In many instances he replies 'present,' and instantly betakes himself back to his committee room or office.

The Senate rules provide:

If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result, and these proceedings shall be without debate.

<sup>1</sup> Death, resignation, or disqualification by the Senate reduces the quorum. March 24, 1886, the Senate decided that on the death of Senator Miller its quorum was reduced to 38. (T. B. Reed's statement, quoted by Alexander, 156.) See Walsh's question as to the Vice-President's ruling, Feb. 27, 1922, that 48 Senators then constituted a quorum.

<sup>2</sup> March 22, 1924. Rule V, sec. 2. See *Cong. Rec.*, 3917, May 15, 1874.

The Senate balks if attempts are made to speed up business by holding morning or night sessions. May 13, 1924, the Senate, at the suggestion of the leaders, 'recessed' until 11 A.M. the following day. Immediately at that hour the majority leader suggested the absence of a quorum. Thirty-one responded to their names, and it was reported that 19 were at that time attending committee hearings, one was ill, and one detained on official business. The Sergeant-at-Arms was directed to 'request' the presence of absent members; and later, to 'compel' their presence. But by 11.37 no quorum had been attained, and the minority leader then moved that the Senate 'adjourn till 12 m.' This adjournment, though but for 23 minutes, was not without significance. Failure to secure a quorum had indicated the Senate's unwillingness to be hurried. By adjourning, the Senate ended the 'legislative day of May 13,' and the opportunity for continuing consideration of 'unfinished business,' the Army Appropriation Bill. The Senators thus got their treasured 'morning hour' — from noon till 2 P.M.! — in which to obtain consideration for private and pet measures.

Although this question is usually raised formally by some Senator, the presiding officer, on his own initiative, may raise it. Or, if the taking of a vote by division or by yeas and nays shows that less than a quorum has voted, the presiding officer announces that 'upon this vote it appears that a quorum of the Senate is not present,' and forthwith directs the Secretary to call the roll. On one occasion the mere statement, in the course of debate, that there 'are by actual count only seventeen Senators present' — despite the fact that the speaking Senator avowed that he did 'not wish to raise the point of no quorum' — was held to necessitate the calling of the roll.<sup>1</sup> A Senator, in the midst of his own speech, may raise the question in order to secure for himself a larger audience or to take a rest while the roll is being called. But he may find himself 'hoist with his own petard.' For, if the call should fail to disclose the presence of a quorum, his speech could not then be continued, and it might prove impossible for him again to get the floor, since the minority present might adjourn.

The rule that any Senator may raise the question as to the presence of a quorum 'at any time' during the daily sessions of the Senate has been hard to reconcile with the other rule that 'No Senator shall interrupt another in debate without his consent, and to obtain such consent he shall first address the Chair.' Declaring that these two rules must be construed together or they do not amount to anything, Vice-President Marshall ruled that when a Senator is addressing the Senate, interruption by another Senator to suggest the absence of a quorum must be with the speaking Senator's consent. On the other hand, President *pro tempore* Gallinger unhesitatingly ruled that a Senator can take another off his feet to suggest the absence of a quorum, and Gilfry states that the later decisions are to the effect that the suggestion of the absence of a quorum, being in the nature of a point of order, can be made at any time.<sup>2</sup> But the Senate has sustained the ruling that a Senator does not lose the floor at the time suggestion of the absence of a quorum is made,<sup>3</sup> but only when the fact of its absence is disclosed.

The rule permitting a Senator to suggest the absence of a quorum at any time clashes also with the rule that 'the reading of the *Journal*

<sup>1</sup> Oct. 23, 1913, *Cong. Rec.*, 5762.

<sup>2</sup> For the inconsistent precedents upon this point, see Gilfry, *Senate Precedents*, I, 497, 498; II, 209-10.

<sup>3</sup> Feb. 8, 1915, *Cong. Rec.*, 3274-81.

shall not be suspended unless by unanimous consent,' and it has been held that 'the reading of the *Journal*, after it has been commenced, must be concluded, except by unanimous consent' — an interruption for the suggestion of the absence of a quorum, therefore, not being in order.<sup>1</sup>

May one suggestion of the absence of a quorum be promptly followed by another, despite the fact that a roll-call has just disclosed that a quorum is present? Obviously if this were tolerated, such suggestions might lead to most dilatory obstruction. Hence, without formally amending its rules, the Senate has recognized a 'rule of reason' — subject to somewhat varying interpretations — that when a roll-call has shown the presence of a quorum, its absence may not again be suggested, 'no business having intervened.' But what is 'business'? This question received most extended consideration in 1911, when Vice-President Sherman overruled the point of order that there was no quorum on the ground that no business had intervened since the last call.<sup>2</sup> When there was cited the ruling of April 20, 1872,<sup>3</sup> to the effect that 'there was discussion that intervened, and therefore business of the Senate,' he called attention to the fact that since that isolated ruling the Senate had repeatedly held that discussion is not business, a ruling to that effect having gone unchallenged in 1897, while in 1908 the Senate had twice and by large majorities voted that debate was not intervening business. These precedents were cited in detail by Vice-President Marshall in justifying his similar ruling,<sup>4</sup> which was in effect that 'mere debate, or the continuation of speech-making is not of itself business within the meaning of the rule.'<sup>5</sup> A few months later, however, another presiding officer ruled that, debate having proceeded, there had been sufficient business to authorize the suggestion of the absence of a quorum,<sup>6</sup> and in the same month came another ruling that a motion to adjourn, since the last roll-call, constituted intervening business in the meaning of the rule.<sup>7</sup>

<sup>1</sup> Vice-President Sherman, April 22, 1910, *Cong. Rec.*, 5179-82.

<sup>2</sup> Gilfry, *Senate Precedents*, I, 494-97.

<sup>3</sup> Presiding Officer Ferry, *Cong. Globe*, 2627.

<sup>4</sup> Gilfry, *Senate Precedents*, II, 212-13. July 27, 1914, *Cong. Rec.*, 12793-94.

<sup>5</sup> This is W. J. Stone's wording. Gilfry, *Senate Precedents*, II, 212.

<sup>6</sup> Warren, Sept. 29, 1914, *Cong. Rec.*, 15862. See Sherman's guarded comment, Gilfry, *Senate Precedents*, I, 495.

<sup>7</sup> Robinson, Sept. 18, 1914, *Cong. Rec.*, 15355. Other presiding officers had earlier counted the Senate or asserted the propriety of their doing so; Vice-President Breckinridge, March 15, 1858 (Gilfry, *Senate Precedents*, I, 487); Carpenter, Feb. 23, 1871



Is the quorum, necessary for the doing of business in the Senate, a present quorum or a voting quorum? This question was frankly faced, June 19, 1879, when the vote on the question of tabling an appeal from the ruling of the Chair was found to be: yeas 32, nays 3 — no quorum voting. The President *pro tempore*, Thurman, counted the Senate, and then said:

The Chair does not think that the fact that a quorum has not voted is conclusive evidence that a quorum is not present. On the contrary, in the opinion of the Chair, he has a right to count the Senate. He has counted the Senate and found that a quorum is in attendance; but a quorum has not voted.

Although a presiding officer some years later declared that he did not 'know of any rule in the Senate which justifies or authorizes the presiding officer to count a quorum,'<sup>1</sup> successive occupants of the Chair have assumed that power without hesitation. In 1908, no quorum having voted upon a motion to table an appeal from a decision of the Chair, Vice-President Fairbanks counted the Senate, and announced that a quorum was present, and so the motion prevailed.<sup>2</sup> Four years later, Vice-President Sherman distinctly ruled that the lack of a quorum voting did not affect the decisiveness of a vote, the presence of a quorum having just been disclosed.<sup>3</sup> The correctness of this interpretation of the Constitution's requirement has in effect been affirmed by the Supreme Court.<sup>4</sup>

President *pro tempore* Clarke once assumed to declare a quorum present and a motion passed, without directing that an accurate count of the Senate be made. A division having been called for upon his declaring the *Journal* approved, its result was announced as follows: 'There were on division — ayes 31. A quorum is present; the ayes have it; and the *Journal* is approved.' When a Senator requested an announcement of the vote, he responded: 'Thirty-one Senators voted in the affirmative, and about twenty Senators were present and declined to vote.' Protests called forth his declaration, (*Senate Precedents*, 493); Carpenter, May 15, 1874 (*ibid.*, 487). Thurman's ruling was made June 19, 1879 (*ibid.*, 488).

<sup>1</sup> Bacon, March 2, 1897, *Cong. Rec.*, 2736-37.

<sup>2</sup> May 29, 1908. He counted the Senate twice, that day. *Ibid.*, 7158, 7166.

<sup>3</sup> March 20, 1912, *ibid.*, 3674-78.

<sup>4</sup> In *U.S. v. Ballin* it was held that 'as the House *Journal* showed a quorum present, the bill had received votes enough. In other words, it matters not how a quorum is obtained, so long as the *Journal* records one as present, and a majority voting for the bill.' (144 U.S. 1.) For the history of the contest in the House, see De A. S. Alexander, *op. cit.*, ch. IX, 'Creating and Counting a Quorum.' See also *National Prohibition Cases*, 253 U.S. 386.

'The Chair without any hesitancy says that a quorum is present, and that the motion is adopted,' and later acknowledged that his ruling meant that 'when a division is called for . . . there is no record made of those present or absent, and it is simply a question of judgment with the Chair whether or not the motion is carried.'<sup>1</sup>

While Vice-President Sherman presided over the Senate, he often declared motions carried or not carried, despite the fact that no quorum voted upon them, for he added to the list of voting Senators the names of those who had announced their pairs and had therefore withheld their votes.<sup>2</sup> From one of these decisions an appeal was taken to the Senate, and by a vote of more than two to one the Chair's decision was not sustained.<sup>3</sup> Nevertheless, subsequently on at least three occasions Vice-President Sherman counted paired non-voting Senators to make a quorum.<sup>4</sup> Before the last of these counts had been made, the same question arose while Senator Lodge was in the Chair, and he announced: 'It has not been the practice of the Senate to count as present, in order to make a quorum, those Senators who announce pairs and refrain from voting.'<sup>5</sup> When this question was first presented to Vice-President Marshall, he counted the paired Senators to make a quorum, and announced that he would be glad to have an appeal from that decision. His ruling was not reversed, and he continued the practice.<sup>6</sup>

When it has been officially determined that a quorum is not present in the Chamber, what may be done? As has been noted, the Constitution and the Standing Rules make provision whereby the minority present may adjourn from day to day, and may compel the attendance of the absentees. But, pending the appearance of a quorum, the business of the Senate is practically at a standstill. Messages may be received from the President or from the House,<sup>7</sup> and a bill or a joint resolution may be signed, though a quorum be not present.

<sup>1</sup> June 10, 1913, *Cong. Rec.*, 1928. A roll-call a moment before this discussion showed 60 Senators present; another, a few minutes later, showed 64 present. For similar determinations, see *ibid.*, 375, March 20, 1912; 2398, Jan. 27, 1915.

<sup>2</sup> Dec. 17, 1910, *ibid.*, 443.

<sup>3</sup> Dec. 19, *ibid.*, 478.

<sup>4</sup> Aug. 11, 1911, *ibid.*, 3826-27. (This ruling was protested the next day by Bacon, *ibid.*, 3859.) March 30, 1912, *ibid.*, 3678; June 4, 1912, *ibid.*, 3859.

<sup>5</sup> May 25, 1912, *Cong. Rec.*, 7155. Jan. 14, 1914, the Committee on Rules reported a proposed amendment providing that 'any Senator, upon his own request, may be recorded and counted as present, in order to constitute a quorum.' It was debated at some length, March 26, but 'went over on objection,' and no action was taken later.

<sup>6</sup> July 3, 1914, *ibid.*, 11587-88.

<sup>7</sup> Aug. 5, 1886, *ibid.*, 8022; Oct. 23, 1914, *ibid.*, 16958.

But no speech is in order, and debate must cease.<sup>1</sup> Rulings have differed on the question whether less than a quorum may take a recess, but in recent years by unanimous consent recesses have been taken, no quorum being present.<sup>2</sup>

## VOTING

In the Senate most decisions are by a simple *viva-voce* vote, in response to the presiding officer's call for the 'ayes' and 'noes.' If he declares himself in doubt, or if the decision does not seem clear to the members, a division is asked for, whereupon in turn those who favor and those who oppose the pending motion are directed to rise and stand until they are counted. The Secretary counts those standing within the bar of the Senate, and states the result to the presiding officer who announces the vote.<sup>3</sup>

The Constitution of the United States requires (1) that 'the Yeas and Nays of Members of either House shall, at the desire of one-fifth of those present, be entered on the Journal,' and (2) that in case of the reconsideration of a bill which has been vetoed by the President, 'the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.'<sup>4</sup>

Whenever a Senator desires a record vote, he exercises his right to call for the yeas and nays, whereupon the presiding officer asks if the yeas and nays are demanded by one-fifth of those present, requesting those who favor such action to raise their right hands. In practice this procedure is considerably shortened, for hands are raised as soon as the Senator's call is heard, and the Chair's decision is often by a glance, not by a formal count.<sup>5</sup> The provision as to the calling of the yeas and nays is the one rule made sacrosanct against suspension by unanimous consent, it being expressly provided: 'No motion to

<sup>1</sup> Gilfry, *Senate Precedents*, II, 213, 218.

<sup>2</sup> *Ibid.*, I, 501, 503.

<sup>3</sup> *Ibid.*, 606. The rules make no provision for this so-called 'division.' *Ibid.*, II, 142.

<sup>4</sup> Constitution, art. I, sec. 5, par. 3; sec. 7, par. 2.

<sup>5</sup> An appeal from the decision of the Chair that the yeas and nays were not ordered was not sustained. Sept. 18, 1914, *Cong. Rec.*, 15354.



suspend this rule shall be in order, nor shall the presiding officer entertain any request to suspend it by unanimous consent.’<sup>1</sup> The Chief Clerk at once calls the roll alphabetically, and the Senators individually answer ‘aye’ or ‘no.’ When the roll-call is about to begin, an electric signal sounds throughout the Senate Wing and in the Senate Office Building, and members come trooping into the Chamber, in which at the beginning only a very small number may have been seated. At the conclusion of the call of the roll, those who have entered the Chamber since their names were called stand within the bar until they are individually recognized by the Chair, who says: ‘The gentleman from Alabama’ — or whatever his State may be. The Clerk then calls his name, ‘Mr. Blank.’ He responds ‘Aye’ or ‘No,’ and very likely forthwith vanishes, to appear again only when the signal announces another roll-call. The Secretary reads his record of the Senators’ votes for corrections, which are at times highly opportune.<sup>2</sup> His footings are then made and handed to the Presiding Officer, who announces the result.<sup>3</sup> If it is disclosed that a quorum has not voted, unless the Chair counts enough paired Senators to complete a quorum and thus make the result of the vote binding,<sup>4</sup> another roll-call may at once be called for. As a roll-call consumes about six minutes, a minority of less than a dozen, by demanding the yeas and nays upon every legitimate parliamentary opportunity, have often used this privilege as a most effective means for filibustering.<sup>5</sup>

<sup>1</sup> Rule XII, cl. 1. Suspension by unanimous consent is also forbidden by Rule XL. Rule XII also provides that no Senator shall be permitted to vote after the decision shall have been announced by the Chair, but that he ‘may for sufficient reasons, with unanimous consent, change or withdraw his vote.’ Despite the above prohibition Senators have occasionally been permitted, by unanimous consent — when their voting would not change the result — to have their votes recorded after the result had been announced. This was doubtless for the edification of the Senator’s constituents. (Gilfry, *Senate Precedents*, I, 573.) Not infrequently permission is granted to a Senator to change his vote, sometimes that he may be recorded with the majority, in order that he may be enabled to move a reconsideration. (*Ibid.*, 574.)

<sup>2</sup> May 14, 1924, when the vote was being taken on the vetoed Pension Bill, the preliminary check-off showed that the veto had been overridden. A Republican Senator who had been sitting beside the Republican whip arose, asking, ‘How am I recorded?’ When informed that he was recorded in the affirmative, he announced that this was a mistake, as he wished to be recorded in the negative. That decided the battle; the veto was sustained.

<sup>3</sup> No motion or other proceedings can be interposed between the calling of the yeas and nays and the announcement of the vote. Feb. 13, 1871, *Cong. Rec.*, 1602-03.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 492-93.

<sup>5</sup> When the Senate’s membership is complete, forty-nine constitutes a quorum. Hence ten Senators suffice to demand the yeas and nays. Note Underwood’s threat (p. 411).

'Each Senator,' says Rule XII, 'shall, without debate, declare his assent or dissent to the question, unless excused by the Senate.' Of course there is vote-dodging. Senators fail to respond to the signal summoning them from office or committee-room to the Chamber; others find it inconvenient to make train connections that will get them back to Washington in time for a critical vote; some sit silent, when their names are called. Members are often excused, upon their voluntary request, from voting upon a matter in which they have some personal interest.<sup>1</sup> The rule continues:

When a Senator declines to vote on call of his name, he shall be required to assign his reasons therefor, and having assigned them, the Presiding Officer shall submit the question to the Senate: 'Shall the Senator, for the reasons assigned by him, be excused from voting?' which shall be decided without debate; and these proceedings shall be had after the roll-call and before the result is announced; and any further proceedings in reference thereto shall be after such announcement.

<sup>1</sup> Thus, a Senator has been excused from voting upon a question upon which he had previously ruled when occupying the Chair. Benton was twice excused from voting in the impeachment proceedings against Judge Peck of his own state, April 26, 1830, and Jan. 31, 1831. Blease was excused from voting when the question of the impeachment of Judge English was being considered by the Senate. Jan. 22, 1821, leave to abstain from voting on the ground that he was interested in the provisions of the pending bill was not granted to Smith. *Senate Journal*, 152.

The appointment of J. R. Grundy (Penn.) to fill a vacancy in the Senate in 1929 was severely criticized, on the ground that for years in Washington he had been the chief 'legislative agent' of tariff-protected industries of his state. His 'maiden speech' of one minute in the Senate was to state that he would not vote upon the wool and woolens schedule of the pending bill, since it was a tariff-sheltered industry in which he had an interest, thus evincing a more tender sensibility than some of his severest critics, whose voices and votes had been incessantly at work in support of tariff rates calculated to benefit their own financial interests.

Absent members are not allowed to have their votes recorded later. In a few early instances this had been done, when the vote thus recorded would not affect the decision. The issue was raised under dramatic conditions in 1854. Shortly before midnight, March 3, Douglas rose to close the debate on the Kansas-Nebraska Bill. Edward Everett had opposed the bill both in the Committee on Territories and on the floor of the Senate. On this night he remained till 3.30 A.M., when illness forced him to go home. He believed that the vote could not be reached at that session. Douglas spoke till daybreak, and then the vote was taken, resulting in the passage of the bill, 38 to 14. At the next session of the Senate, Everett explained his absence and asked the privilege of having his vote recorded. Clayton made a similar request, because he, too, had been forced by illness to leave the Chamber before the vote. The request could be granted only by unanimous consent. After debate and the citing of precedents, Dodge declared: 'If this request is granted, there will be no end of the thing. It is with great respect to the two Senators that I object.' Dodge's forecast as to the result of granting this request was doubtless justified. But the result for Everett was a cruel and undeserved misfortune. His stand upon the bill was perfectly clear to his colleagues; but the fact that he had not voted gave rise to the rumor that his absence from the Chamber was a cowardly evasion of the issue. Stung by the injustice of the criticism based upon this groundless charge, within a few months Everett resigned and withdrew from public life.

It is not for the Chair on his own motion to require a Senator to vote, or to assign his reasons for not voting.<sup>1</sup> But a Senator may take the initiative, and invoke this rule. Thus, in 1893, Vilas, before the announcement of the result in a yea-and-nay vote, called the attention of the Chair to the fact that Dubois was present and not voting, and asked that under Rule XII he be required to assign his reasons for declining to vote. The Vice-President thereupon directed that Dubois's name be called. He declined to vote and assigned his reasons. When the question was put to the Senate whether for the reasons assigned he should be excused from voting, the Senate by decisive vote refused to excuse him. Thereupon the Vice-President again directed that his name be called. Again he declined to vote. But no further action was taken upon his refusal.<sup>2</sup> 'Each Senator shall . . . declare his assent or dissent to the question, unless excused by the Senate.' So stands this bald mandate, in Rule XII. But no compulsion or penalty awaits the Senator who disregards this injunction. Indeed, nearly half a century ago the Presiding Officer declared:

The practice of the Senate in permitting its members, without question, or challenge, to withhold their votes, whenever they have thought fit to do so, has been so uniform and unbroken, that, so far as precedents can make it so, it has become an absolute parliamentary right, and cannot be questioned without reversing the steady practice upon which the members of the body have a right to rely as their protection in the exercise of their discretion in giving or withholding their votes.<sup>3</sup>

## PAIRING

---

Benton is authority for the statement that 'pairing off,' when it first appeared in the House, meant 'two members of opposite political

<sup>1</sup> Gilfry, *Senate Precedents*, I, 577. Garland, in the Chair. March 3, 1881, *Cong. Rec.*, 2423.

<sup>2</sup> Oct. 13, 14, 1893, *Cong. Rec.*, 2469-79; 2509-10.

<sup>3</sup> *Ibid.*, 2423, March 3, 1881. The House Rule VIII requires that 'every Member . . . shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question.' But the Speaker has usually held that the member himself should determine this question, and thus control his own vote. *House Manual*, secs. 656-59. 1934.



parties agreeing to absent themselves from the duties of the House, without the consent of the House, and without deducting their *per-diem* pay during the time of such voluntary absence.<sup>1</sup> In 1840 for the first time,<sup>2</sup> as his excuse for not voting, a member stated that he had 'paired off' with another member, whose affairs required him to go home.

It was a strange annunciation and called for rebuke. . . . John Quincy Adams immediately proposed to the House the adoption of this resolution:

'Resolved: that the practice of pairing off involves on the part of the members resorting to it the violation of the Constitution of the United States, of an express rule of this House, and of the duties of both parties in the transaction to their immediate constituents, to this House and to their country.'

During his own thirty years' service in the Senate, 1821-51, Benton declared he had never seen an instance of pairing there.

But the practice has since penetrated that body, and 'pairing off' has become as common in that House as in the other, in proportion to its numbers, and with an aggravation of the evil, as the absence of a Senator is a loss to his State of half of its weight. As a consequence, the two Houses are habitually found voting with deficient numbers — often to the extent of a third — often with a bare quorum.<sup>3</sup>

By 1860 the practice had become so regularized that a Senator, when called upon to vote, might refuse to answer to his name and be excused on the ground that he was paired with another member.<sup>4</sup>

The House rules provide for the formal announcement by the Clerk — but the system, says Mr. Luce, is for the most part a farcical pretense.<sup>5</sup> In the Senate, although pairing is a feature of every day's proceedings and often determines the decision upon most important issues, pairs have remained entirely unrecognized by the Standing Rules.<sup>6</sup> In connection with every yea-and-nay vote they are an-

<sup>1</sup> *Thirty Years' View*, II, 178.

<sup>2</sup> Robert Luce mentions H. W. Dwight's having been excused from voting in 1824, 'as a matter of keeping faith after he had agreed with a Virginia member to leave town, but was detained.' (*Legislative Procedure*, 380.)

<sup>3</sup> Benton, *op. cit.*, II, 170 ff. Adams's resolution was placed on the calendar and not brought to a vote.

<sup>4</sup> June 20, 1860, *Cong. Globe*, 3191.

<sup>5</sup> Rule VIII, cl. 2. See also Rule XV, cls. 2 and 3. See *Cong. Rec.*, Aug. 27, 1918, for Speaker Clark's interpretation of the rule and practice of the House as to pairs. *House Manual*, under Rule VIII, cites numerous precedents from Hinds. Robert Luce, *Legislative Procedure*, 381.

<sup>6</sup> In the debate of May 11, 1911, the presiding officer (Lodge) declared: 'The Chair is of the opinion that pairs are not recognized by the rules anywhere, and that they are only a reason for not voting.' Bailey: 'They are recognized by the uniform practice of the Senate.' *Cong. Rec.*, 1185.

nounced by the paired Senator, by the party whips, or by some colleague, frequently stating the cause of the Senator's absence, and how he would vote upon the pending question, if present.<sup>1</sup> The pair may be a 'general pair' between two members of opposite parties, covering all political questions and running for an indefinite period, often for months; or it may be a limited pair, for a single day, or upon an individual issue, or a single vote. In pairing upon matters which require a two-thirds vote for decision — such as an amendment to the Constitution, a consent to the ratification of a treaty, or the overriding of a veto — it has been 'the universal practice and what is obviously fair' that 'pairs must be two "for" to one "against."' <sup>2</sup> It has been held that a general pair does not bind a Senator on such a vote.

Under what conditions may a paired Senator vote? It often happens that a Senator who has formed a general pair wishes to record his own vote in person, either because he feels strongly upon the pending question, or because he thinks that his constituents are exceptionally alert upon that issue.<sup>3</sup> In his dilemma he can get no light from the presiding officer.<sup>4</sup> But he may seek and receive advice from the floor. When the vote was being taken upon the Chinese Exclusion Bill in 1888, Teller stated that he had 'a pair on all political questions' with Lee. 'I have been assured repeatedly that he was in favor of the passage of this bill. Unless someone on the Democratic side will say that this bill has assumed a political phase, I shall vote.' Gray: 'I think the Senator is quite at liberty to vote, in that view of the case. There is no political question in it.' Teller: 'I vote "Nay."' <sup>5</sup>

<sup>1</sup> Various forms of announcing pairs are cited in Gilfry, *Senate Precedents*, I, 613-14. As a typical example, when a Senator's name is called, he responds: 'I am paired with the Junior Senator from ——. If he were present he would vote "Nay"; and if I were at liberty, I would vote "Aye."'

<sup>2</sup> Lodge, *Cong. Rec.*, 2571, Feb. 15, 1911. See Brown's opposing view, *ibid.*, 2571. See Bacon's announcement of such a pair with Tillman and Overman, June 12, 1911.

<sup>3</sup> He may cite definite permission from his pair: 'I desire to state that I voted against the Bristow amendment, although paired with the Senior Senator from Maine (Mr. Frye), because I had his authority to do so.' (May 12, 1911, *Cong. Rec.*, 11924.) Or he may be enabled to accomplish his purpose by a transfer. Thus, Jan. 25, wishing to vote on the Branch Banking Bill, Tydings announced: 'I have a general pair with the Senior Senator from Rhode Island (Metcalf). That pair having been transferred to the Junior Senator from Louisiana (Long), I am at liberty to vote "Yea"' (*ibid.*, 2517).

<sup>4</sup> 'The Chair is of the opinion that the matter of pairs is one with which the Senate has nothing whatever to do, and cannot settle any controversy of that character.' So replied the President *pro tempore* when Calder raised the question whether his pair with another Senator for the previous session was still binding. (May 28, 1919.)

<sup>5</sup> Sept. 7, 1888, *Cong. Rec.*, 8367, Bacon once announced his pair, adding: 'We have an understanding that each can vote upon occasions when we deem it proper that are non-political. This is certainly not a political question.' (Dec. 18, 1910.)

If the present Senator feels sure in his own mind, or if he receives such assurance from his colleague, that this absent pair would vote as he wishes to do, he feels at liberty to vote.<sup>1</sup> If he has no intimation how his absent pair would vote upon an unexpected issue, he often announces that he withholds his vote, at the same time stating how he would vote were he at liberty to do so.<sup>2</sup> In case he has already voted, on the supposition that his pair would be present, and then finds that the pair is absent, he withdraws his vote.<sup>3</sup> It is recognized that the Senator who is present may vote if his pair is absent 'on official business.'<sup>4</sup>

Senators who are about to absent themselves from the Senate leave instructions with Assistant Doorkeepers of their several parties, and through them a paired Senator who wishes to vote upon a given question can usually effect a transfer which will enable him to do so with a clear conscience. The groups of pairs announced by the party whips represent offsets which the named Senators may never have contemplated.

Perhaps the most astonishing pair in Senate history was disclosed by the removal of the injunction of secrecy from a certain stage of the proceedings as to confirmation of the appointment of George Rublee as a member of the Federal Trade Commission, when it was shown that reconsideration of the vote by which the Senate had refused its consent to the appointment was rejected by a tied vote, in which the first pair recorded was that of the Democratic Vice-President (who, under the Constitution, has only a casting vote) with a Democratic Senator.<sup>5</sup>

Shall a Senator be excused from voting on the ground that he is paired with another member? As early as 1860, when pairing, according to Benton, had been practiced in the Senate less than ten years, this question was already being answered in the affirmative.<sup>6</sup> Fifty years later, in the midst of the controversy over the counting of paired Senators to make a quorum, two Senators, who assigned

<sup>1</sup> Jones, paired with Swanson, March 15, 1920.

<sup>2</sup> King, paired with Swanson, Dec. 19, 1919.

<sup>3</sup> Chamberlain, paired with Knox, March 17, 1920.

<sup>4</sup> Underwood, announcing a general pair with Harding, 'He is absent on official business, and I have the privilege of voting on this bill, notwithstanding my pair. I vote "Nay."' (Dec. 19, 1919.)

<sup>5</sup> May 23, 1916, *Cong. Rec.*, 8510. *The Searchlight on Congress*, June 10, 1916, discusses this action as of doubtful constitutionality, and cites other surprising instances of manipulated pairs.

<sup>6</sup> June 20, 1860, *Cong. Globe*, 3191.



their being paired as their reason for abstention, were excused from voting.<sup>1</sup> In 1911 the contest over the election of the President *pro tempore* occasioned a long and spirited discussion over the nature and the obligation of pairs. After conference with other Republican leaders, Root invoked the rule that no Senator shall be excused from voting on any question without the consent of the Senate, declaring that he did not wish the pairing of two Republican Senators, the effect of which would be to 'destroy two Republican votes and defeat the candidate of the Republican caucus, and, if effective, to elect a Democratic President *pro tempore* of the Senate.'<sup>2</sup> The issue was not forced, but during the debate Bailey declared that if he were paired, and the Senate should attempt to compel him to vote in violation of that agreement, he would defy the order to the point of expulsion.

This difficulty with pairs in contests over the choice of officers at the opening of several Congresses led the Republican Conference in 1919 to adopt a ruling that pairs should not be recognized in organizing the Senate, an action against which the Democratic caucus promptly protested.<sup>3</sup> Rumors of plans to 'declare all pairs off' have come from each side of the Chamber, at times when one party or the other saw a prospect of advantage from such a course.<sup>4</sup> These proposals are based upon the view that pairs can exist only by unanimous consent, and that any Senator may move that pairs be disregarded or dissolved and the present Senators required to vote.<sup>5</sup>

As to the nature of pairs, Lodge spoke of them as 'only a reason for not voting,'<sup>6</sup> and said that 'if all pairs are to be objected to and broken, that is all right. There is no objection to that at all.'<sup>7</sup> Heyburn declared that every pair was made subject to two conditions — that the Chair might order a pair broken to make a quorum, and that the Senate might decide that pairs should be broken in order that the transaction of public business might not be defeated because of the presence of paired Senators.<sup>8</sup> Bailey, on the other hand, held the pair to be of broader significance and higher authority.

<sup>1</sup> Dec. 19, 1910, *Cong. Rec.*, 484-87.

<sup>2</sup> May 11, 1911, *ibid.*, 1184-87.

<sup>3</sup> Press reports of May 17, 1919.

<sup>4</sup> This plan, according to press reports, was considered by the Democrats in March, 1925, during the fight over the Warren nomination, three paired Republican Senators being so far from Washington as to make their return in time for a vote impossible. But the nomination was defeated without resorting to that device.

<sup>5</sup> *Cong. Rec.*, Dec. 18, 1910.

<sup>6</sup> *Ibid.*, 1185, May 11, 1911.

<sup>7</sup> *Ibid.*, 2671, Feb. 15, 1911.

<sup>8</sup> *Ibid.*, 1186, May 11, 1911.

The purpose of the pair was not wholly to serve the convenience of Senators. It was broader and more important than that. It was to preserve the relation between the parties which the people had established by their election. It was to provide against a contingency when a large number of the majority party happened to be sick or absent, whether engaged upon their personal affairs or public business. . . . The pair, having been recognized universally in the Senate until it has become part of the Senate procedure, is a matter for each Senator's own conscience and not for the Senate to determine. . . . No majority can determine for an honorable man whether he will keep his word.<sup>1</sup>

Bailey's exposition of the pair seems much idealized in comparison with present-day pairing practice in the Senate. In the first place, pairing in most cases deliberately sets at naught two rules of the Senate which require that no Senator shall absent himself from the service of the Senate without leave, and that each Senator shall vote unless excused by the Senate.

If but two distinct party groups were represented in the Senate, if party programs were clean-cut expressions of party beliefs and purposes, general pairs between members of the majority and minority might find a measure of justification in their tendency to preserve the party balance which the voters had intended. But pairs are formed between Senators of different groups or blocs;<sup>2</sup> and but few of measures to be voted upon are in form or content such that any party's pronouncement upon them is clear, and they undergo constant modification as a result of Senate debate. Hence, when a question comes on for a vote, the paired Senator who happens to be present guesses how his colleague would be likely to 'stand' on this revamped issue and then searches not only his own conscience but also his judgment of political advantage as to whether he shall record his own vote. The absent 'pair,' of course, has neither heard nor taken part in the deliberations leading to the vote, and may find that his colleague's decision or the manipulation of pairs utterly misrepresented the vote he would have cast.<sup>3</sup> The Senate is entitled to his

<sup>1</sup> *Cong. Rec.*, 1186. \*

<sup>2</sup> In the 68th and 69th Congresses, Republicans, Democrats, and Farmer-Labor parties were officially listed, while a varying number of Democrats and 'Progressives' voted together upon any issue that would embarrass the Republicans.

<sup>3</sup> After several terms' observation of pairing in the House of Representatives, Congressman Luce declared: 'The system is for the most part farcical. A few "live pairs" (where men definitely arrange to offset each other) are above criticism, but the rest of the business is pretense. . . . The assumption is that every vote is a party vote, and that every absentee if present would vote with the leaders of his party, both of which things are far from true. Therefore the printed list has no real significance.' (*Legislative Procedure*, 381.)

presence, to his participation in the consideration of the measure, and to his vote in the decision.<sup>1</sup>

In the first session of the Sixty-Eighth Congress (December 3, 1923, to June 7, 1924) the yeas and nays were ordered 157 times. Three Senators whose absence, as far as the public was informed, was for reasons of personal convenience, were paired respectively on 48, 56, and 73 of these record votes. Three other Senators were in their home states during a large part of the session, carrying on vigorous campaigns for renomination to the Senate, and in consequence were paired respectively 39, 79, and 81 times on those 157 votes. One eager candidate for the presidential nomination was paired on 74 of the votes; another, though paired but seven times, was absent without pair on 62 of the votes. The direct primary and popular election of Senators have greatly increased the temptation to pursue the chase of votes far from the Senate Chamber. But the flagrant neglect of the responsibilities already entrusted to Senators is not the clearest demonstration of their deserving to be called to further or higher honors.

The seventy-five years which have passed since Benton described 'pairing off,' then a novelty in the Senate, have but confirmed the soundness of his judgment: 'There is no justification for such conduct, and it becomes a facile way for shirking duty and evading responsibility.'<sup>2</sup>

<sup>1</sup> 'When a Senator is withdrawn . . . his State loses half of its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil (as compared with that caused by the voluntary absence of one member of the House) admits of no comparison.' Jefferson's *Manual* (Senate, 1934), 225.

<sup>2</sup> Benton, *op. cit.*, II, 178.

One of the most influential men now in the Senate told the writer that in his opinion there is a growing opposition to pairing. He believed that the 'general pair' has no justification and should be abolished; that pairs should be allowed only on specific questions, in case of sickness and the like. In his own case, in several full terms of service he has been paired but two or three times; he prefers to be recorded frankly as absent, in the very few cases when his vote cannot be given in person.

For anomalous and undemocratic results of pairing in the Senate, due to the immensely different population 'weights' represented by the two paired Senators (e.g., from New York and Nevada) as contrasted with the approximately equal constituencies represented by two paired Representatives, see p. 1008.



## JOINT RULES

The first select committee ever chosen in the Senate was instructed not only to prepare rules for conducting the business of the Senate, but also, in conference with a similar committee from the House, to prepare 'rules for the government of the two Houses in cases of conference.' Its report was promptly accepted.<sup>1</sup> Gradually new rules were added. By 1876 they had grown into a code of twenty joint rules, relating for the most part to formalities attending the legislative work in which both branches of Congress were concerned and to their relations with the President. Nevertheless, as Hamlin remarked, 'it was only by acquiescence in long years that they have been treated and regarded as rules, and not by any affirmative vote either of the House or of the Senate.'<sup>2</sup>

A few days after the question had thus been raised as to the binding force of joint rules which had not been concurred in by both branches of Congress, the Senate passed and sent to the House a resolution providing that the joint rules of the previous session of Congress — excepting the Twenty-Second Joint Rule, which had been abrogated by Act of Congress — be adopted as the joint rules for the present session. To this the House made no response; but toward the end of the session the House asked the concurrence of the Senate in the usual resolution for the suspension of two of the joint rules — those providing that bills be not sent from either House to the other on the last three days of the session, nor to the President on its last day. Whereupon the Senate 'respectfully returned' this resolution to the House, with the statement that, as the House had not notified the Senate of its adoption of the joint rules as proposed in the Senate's resolution of the previous January, 'there are no Joint Rules in force.'<sup>3</sup> A few months later the Senate by a heavy vote sustained the Chair's decision that no joint rules were then in force.<sup>4</sup>

<sup>1</sup> July 27, 1789. *Senate Journal*, 66-67.

<sup>2</sup> Jan. 10, 1876, *Cong. Rec.*, 1309. For history of this trouble-making 'Twenty-Second Joint Rule,' relating to the canvass of the electoral votes 'in the presence of Congress,' see p. 245.

<sup>3</sup> Aug. 14, 1876, *Cong. Rec.*, 5567.

<sup>4</sup> Dec. 8, 1876, *ibid.*, 97-109.

Despite these formal pronouncements, the section of joint rules, to which Congress through fourscore years had grown accustomed, for nearly a decade continued to be printed in the *Manuals* of the Senate and of the House, and to this day in many respects the relations between the two Houses are conducted in accordance with the joint rules officially declared dead half a century ago.<sup>1</sup>

### THE DAY'S ROUTINE IN THE SENATE

Unless a different hour has been appointed at the time when the Senate last adjourned or took a recess, the Senate regularly convenes at noon. At the stroke of twelve the presiding officer and the Chaplain mount the platform. Upon a single stroke of the gavel the Senators in the Chamber rise and stand while the Chaplain offers a brief prayer.

The regular 'Morning Business' begins with the reading of the *Journal* of the previous day's proceedings.<sup>2</sup> Ordinarily the Clerk has read but a few words when, on request of the majority leader and by unanimous consent, further reading is dispensed with, and the *Journal* is perfunctorily approved, subject to later correction by special motion, if error is discovered. But upon the insistence of any member, the reading of the *Journal* must be continued to the end. In insistence that the *Journal* be read in full, and in debate and votes upon motions for the fantastic 'correction' of the *Journal*, has been found one of the most effective methods of filibustering.<sup>3</sup>

After the approval of the *Journal*, the presiding officer lays before the Senate messages from the President, reports and communications

<sup>1</sup> In the *House Manual*, 1884, they were printed under the heading, 'Joint Rules in Force at the Close of the 43d Congress.'

<sup>2</sup> 'Morning Business' is the title now given to Rule VII. In earlier times the 'Morning Hour' used to extend one hour from the time of the Senate's meeting. Aug. 10, 1888, Hoar's resolution was agreed to, that thereafter the 'Morning Hour' should 'terminate at the expiration of two hours after the meeting of the Senate' — i.e., ordinarily, at two o'clock in the afternoon. (*Cong. Rec.*, 426.) Vice-President Sherman once defined 'Morning Business' thus: 'Certain routine business, as laid down in the rule; that may proceed for two hours, but can be closed before, and is closed before, when the Chair so announces.' (March 5, 1912, *ibid.*, 2816.)

<sup>3</sup> See filibuster against the Dyer Anti-Lynching Bill, p. 410.

from the heads of departments, other communications addressed to the Senate, and such bills, joint resolutions, and other messages from the House of Representatives as may remain upon his table from the previous day's session, undisposed of. These matters usually take but a few moments. In the following order — which can be varied only by unanimous consent — the presiding officer then calls for the presentation of bills and memorials; reports of committees; the introduction of bills and joint resolutions; the introduction of concurrent and other resolutions.<sup>1</sup>

Until the presiding officer shall have announced that the 'Morning Business' has been concluded, or until the hour of one o'clock has arrived, no motion can be entertained — except by unanimous consent, granted without debate upon the merits of the measure in question — to proceed to the consideration of any bill, resolution, report of a committee, or other subject upon the calendar.<sup>2</sup> At the conclusion of the 'Morning Business' for each day, unless the Senate at any time otherwise orders, the Senate proceeds to the consideration of the Calendar of Bills and Resolutions.<sup>3</sup> This continues until the expiration of two hours after the meeting of the Senate. Bills and resolutions not objected to are taken up in their order. During this consideration of the calendar under Rule VIII, each Senator is entitled to speak once and for five minutes only upon any question.<sup>4</sup> Under this provision, which is founded upon the 'Anthony Rule' of nearly fifty years ago, great speed may be developed in the passing of bills to which no objection is raised. Thus, on the afternoon of December 30, 1924, the Senate considered and passed one hundred and thirty-six 'unobjected measures,' some of them of great importance — one involving an appropriation of \$14,000,000.<sup>5</sup> The average

<sup>1</sup> For method of introducing and referring bills, see Rule VII, secs. 1 and 2.

<sup>2</sup> Note qualification at end of sec. 3. Lodge emphasized the importance of reserving the 'Morning Hour' for its distinctive business: 'I think too often, also, we abandon the morning hour, which should be reserved for legislative business, to the discussion of foreign affairs and of general resolutions which rise little above the discussions of a moot court.' Jan. 24, 1906, *Cong. Rec.*, 1469.

<sup>3</sup> Though thus referred to in the rules, this calendar is nowhere authoritatively defined. Gilfry describes it thus: 'It is the record of the business actually before the Senate for its consideration from day to day, such as unfinished business, special orders, notices given by Senators, reported bills and joint resolutions, subjects on the table, and resolutions carried over under the rules. In short, any matter reported from a committee, or ordered placed thereon by the Senate, becomes a part of the calendar.' (*Senate Precedents*, I, 242.) A list of bills in conference and the status of the general appropriation bills are customarily attached to the calendar.

<sup>4</sup> This five-minute debate is often the most effective which the measure receives. It actually gains votes.

<sup>5</sup> *Cong. Rec.*, 999 ff.



time devoted to the consideration and voting upon these measures was less than two minutes. At any stage of the proceedings, however, objection may be interposed to the consideration of any measure, forcing it to 'go over' till a later day.<sup>1</sup> This places great power in the hands of an individual Senator, either to retaliate for past slights or to extort favors for the measure in which he is most interested. Thus, in the crowded days near the end of the Sixty-Ninth Congress, irked because objection had prevented action upon his bill for the adjustment of the century-old French Spoliation Claims, Bruce on a single afternoon by his 'I object' prevented action on not less than ninety-two measures, heedless of their sponsors' pleas.<sup>2</sup>

After the consideration of 'unobjected measures' upon the calendar is completed, and not later than two o'clock, unless there are 'special orders' for that time, the Calendar of General Orders is taken up, and proceeded with in order.<sup>3</sup> Upon the stroke of two o'clock, the presiding officer lays before the Senate the unfinished business. But since no Senate rule requires relevancy in debate, it often happens that the member who has the floor when the unfinished business is laid before the Senate continues to hold forth upon a topic having not the slightest relation to the unfinished business which has just been officially presented.

The routine schedule, as outlined above, often gives way to special orders. By a vote of two-thirds of the Senators present, any subject may be made a special order. At the time thus fixed for its consideration, the presiding officer lays it before the Senate, unless there be unfinished business of the preceding day. If it is not finally disposed of on that day, it takes its place on the Calendar of Special Orders, unless by adjournment it becomes unfinished business.<sup>4</sup>

As a matter of fact, special orders are usually secured, not by a formal two-thirds vote, but by a unanimous consent agreement, under the bargaining facilitated by senatorial courtesy. Such an agreement

<sup>1</sup> But upon motion, determined without debate, the Senate may continue the consideration of any matter, notwithstanding objection, no longer subject to the five-minute limitation.

<sup>2</sup> Jan. 17, 1927, *Cong. Rec.*, 1765-66; 1772-76.

<sup>3</sup> While this is in progress, at any time each of the following motions may be submitted, with all the rights of questions of order, having precedence in the order named and being decided without debate; to adjourn; to proceed to the consideration of executive business; to consider an appropriation or revenue bill; to consider any other bill on the calendar — which motion is not amendable; to pass over the pending subject — which, if carried, leaves it without prejudice in its place on the calendar; to place such subject at the foot of the calendar. Rule IX; C. G. Bennett, *op. cit.*, 4.

<sup>4</sup> For further detail, see Rule X.

is often the only alternative to cloture as a means for bringing a long-pending measure to a vote.<sup>1</sup>

## OBSERVANCE OF SENATE RULES

---

When the Senate took action upon the draft of 'rules for conducting the business of the Senate,' April 16, 1789, it now seems ironic that the *Journal* should record, not that the Senate voted to adopt the rules as reported, but that the Senate 'resolved, that the following rules . . . be observed.'<sup>2</sup>

A century later, the President *pro tempore* declared: 'Rules are never observed in this body; they are only made to be broken. We are a law unto ourselves,'<sup>3</sup> and Anthony, who had presided over the Senate in several Congresses, and upon whose motion the Standing Committee on Rules was first constituted, said, 'The rules of the Senate have been its own sense of propriety and dignity.'<sup>4</sup>

To the score of men who made up the entire Senate during a large part of the First Congress it seemed unnecessary to burden themselves with an elaborate code of rules. No larger than several of the present Senate's major committees, they met in secret session in a small room. Their business was not so extensive but that each Senator could be accorded as much time as he desired to express his views. They were the less eager to subject themselves to elaborate rules for the reason that the administration of such a code would devolve upon

<sup>1</sup> Page 220. In the closing days of the short session (Feb. 1927), when ardent advocates of two entirely unrelated measures — the Farm Relief and Branch Banking Bills — were threatening to hold up legislation, at the instigation of the Vice-President — a rare instance of initiative-taking by an officer who often regards his duties as purely perfunctory — a unanimous-consent agreement was framed so as to schedule the date at which each of these bills, after a stated number of days' debate, should be brought to a vote. But on the floor of the Senate this program encountered opposition, as setting a bad precedent of bargaining between different groups of interests. The result was that the Farm Relief Bill was at once made the unfinished business, and that cloture was then applied to bring the other bill to a vote. *Cong. Rec.*, 2697; 3573.

<sup>2</sup> Similarly ironic seems the appointment of a committee, thirty years later, 'to arrange and report the rules for conducting the business in the Senate and the rules hitherto practiced on by the two Houses of Congress.' Jan. 3, 1820, *Senate Journal*.

<sup>3</sup> J. J. Ingalls, Dec. 18, 1876, *Cong. Rec.*, 266.

<sup>4</sup> Quoted by McConachie, *op. cit.*, 299.

a presiding officer who most of the time would be a man not of their own choosing.

That the members were expected to be a law unto themselves is evident from the simplicity of that first set of rules, which laid down no other requirement as to the daily order of business than that the legislative day should begin with the reading of the *Journal*. Only once in those first rules is found the now familiar phrase, 'unless the Senate unanimously direct otherwise.' Not only was no provision made for the suspension of the rules, but nearly twenty years later such action was so rare that Plumer could write:

The Senate this day suspended their rule requiring a bill to be read on three different days — ayes 15, nays 10. Those in the affirmative were a minority of all the Senators, but a majority of those present. *I think* this is the first instance in which the Senators have suspended their rules. . . . I consider the suspension of the rule so long established as more ruinous to the order of the Senate than any act I have ever witnessed within its walls.<sup>1</sup>

Yet, ominous as this precedent appeared in 1807 to a substantial minority, the Senate's liking for informality and the pressure of business in later years led to the frequent introduction of the phrase most characteristic of the Senate rules — 'unless by unanimous consent.' In the Standing Rules of today, fifteen of their specific prescriptions are qualified by that ever-recurring 'unless . . .' The acme is reached in the final sentence of the very last rule, which provides that, with the exception of the clause which regulates the taking of the yeas and nays, 'Any rule of the Senate may be suspended without notice by unanimous consent.'<sup>2</sup>

<sup>1</sup> Plumer, *Memorandum*, 638, March 3, 1907. The editor cites a suspension of this same rule about seven weeks earlier.

<sup>2</sup> Rule XL. The House has a similar rule. But the motion to suspend the rules has been made of less importance in the House since its perfection of the process of getting bills before the House out of order by a majority vote upon a report from the Committee on Rules. *House Manual* (1934), secs. 908-09.

By decisive vote the Senate has put itself on record that for the suspension of a Standing Rule of the Senate the requirement of a 'two-thirds majority' shall be 'strictly construed in accordance with the literal language' of the phrase. Jan. 13, 1915, Gilfry, *Senate Precedents*, II, 271. For other precedents as to suspension, *ibid.*, 517-18.



## REFERENCES

- 
- Rules and Manual of the United States Senate.* Annual edition, containing: 'Standing Rules and Orders of the Senate,' 'Articles of Confederation,' 'Constitution of the United States,' 'Jefferson's Manual,' etc.
- Gilfry, Henry H. *Precedents of the United States Senate.* 1914.
- Hinds, Asher C. *Precedents of the House of Representatives.* 1907.
- Alexander, De Alva S. *History and Procedure of the House of Representatives,* especially chapters IX, X, and XI. New York, 1916.
- Gilbert, C. W. 'Our Senators and their Rules,' *Review of Reviews*, vol. 71, p. 618.
- Hatch, Louis C., and Shoup, Earl L. *A History of the Vice-Presidency of the United States*, ch. VI, 'The Presidency of the Senate and its Rules of Procedure.' New York, 1934.
- Lodge, Henry C. 'The Senate of the United States,' in *A Frontier Town*, 70.
- Luce, Robert. *Legislative Procedure* (Boston, 1922), especially chs. I, II, X, XV.
- Moses, George H. 'Speaking of the Senate,' *Saturday Evening Post*, July 25, 1931.
- Peffer, William A. 'The Senate's Powers and Functions, Its Rules and Methods of Doing Business,' *North American Review*, vol. 167, p. 176.
- Pepper, George W. *In the Senate*, 1930. Philadelphia.
- 'What is the Senate?' *Forum*, vol. 74, p. 863.
- White, Stephen M. Speech on 'Senate Rules,' in Senate, January 10, 1896, *Cong. Rec.*, 551-57.



# VIII

---

DEBATE IN THE SENATE

---



---

★

Few forms of literature or history are so dull as the narrative of political debates. With a few exceptions, a political speech like the manna in the wilderness loses its savor on the second day.

JOHN MORLEY

In the twenty-eight years that I have been a member of one or the other branches of Congress, I have never known a speech to change a vote.

CARTER GLASS

To vote without debating is perilous, but to debate and never vote is imbecile. . . . A body which cannot govern itself will not long hold the respect of the people who have chosen it to govern the country.

HENRY CABOT LODGE

Were this the first session of the Senate and its present system of rules, unchanged, should be presented seriously for adoption, the impact of outraged public opinion, reflected in the attitude of the Senators themselves, would crush the proposal like an egg-shell. Who would dare maintain that in the last analysis the right of the Senate itself to act should ever be subordinated to the right of one Senator to make a speech?

VICE-PRESIDENT CHARLES G. DAWES (March 4, 1929)

---

★

# VIII

---

## DEBATE IN THE SENATE

---

### DECORUM IN DEBATE

---

#### RECOGNITION

When a Senator desires to speak, he shall rise <sup>1</sup> and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. (Rule XIX, 1.)

THE Senate cannot take away from the presiding officer the right to recognize a Senator,<sup>2</sup> nor is there any appeal from his decision,<sup>3</sup> but he may submit to the Senate the question as to which member first addressed him.<sup>4</sup>

Senate presiding officers have differed in the rigor of their insistence that recognition shall first actually be obtained, but strict compliance with the rule is highly essential if confusion is to be avoided, and if the Senate reporters are to be enabled to make an intelligent record of the proceedings.<sup>5</sup> When a Senator has secured recognition and is address-

<sup>1</sup> In 1911 the Vice-President sustained the point of order that La Follette was not entitled to recognition, since he did not rise when addressing the Chair. Aug. 17, *Cong. Rec.*, 4066.

<sup>2</sup> Gilfry, *Senate Precedents*, I, 523.

<sup>3</sup> *Ibid.*, II, 223.

<sup>4</sup> *Ibid.*, 223, 1.

<sup>5</sup> Both Vice-Presidents Fillmore and Marshall laid stress upon the importance of compliance with this rule. (*Ibid.*, I, 570; II, 133-34.) In Fillmore's day the rule against interruption was more stringent than today. It provided: 'No member shall speak to another or otherwise interrupt the business of the Senate or read any newspaper while the Journals or public papers are reading, or when any Member is speaking in any debate.'

ing the Senate, he is often beset by others who wish to secure the Senate's attention. Rule XIX further provides:

No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer.

Upon such address the presiding officer inquires whether the Senator who has the floor 'yields' — consents to the interruption. Let him consider well his answer; for compliance with the request may cause him to lose his own control of the floor, without securing a hearing for the member who seeks it. The Chair has repeatedly ruled that a Senator cannot yield the floor, if objection is made. In 1911, while Senator Owen of Oklahoma was speaking, the following colloquy took place:

Mr. Beveridge addressed the Chair.

The Vice-President (Mr. Sherman). Will the Senator from Oklahoma yield to the Senator from Indiana?

Mr. Owen. I yield.

Mr. Beveridge. At this most important . . .

Mr. Heyburn. Mr. President, I object to the Senator from Oklahoma yielding.

The Vice-President. Objection is made. The Senator from Oklahoma will proceed.

Mr. Beveridge. Does not the rule of the Senate provide that a Senator may be interrupted by his own consent?

The Vice-President. There is no rule which provides that a Senator may yield the floor to any other Senator in the face of an objection. The Senator from Oklahoma will proceed.<sup>1</sup>

Ordinarily without arousing protest a Senator, without losing control of the floor, yields to another for an inquiry only, not for the making of a speech, the presentation of a bill or the making of a report. At times the Senate is very easy-going, allowing brief comments or explanations if not speeches to be interjected without protest. But it has been repeatedly ruled that a Senator 'has no right under any rule or practice of the Senate to hold the floor and "farm it out"';<sup>2</sup> nor

<sup>1</sup> March 1, 1911, *Cong. Rec.*, 3755. Sept. 17, 1914, the Senate sustained a point of order as to the effect of an objection, but a few hours later apparently reversed its position. Gilfry, *Senate Precedents*, II, 167-69.

<sup>2</sup> 'The rules that prevail in the House of Representatives, where one member can peddle out his time to another, or state what time he will or will not yield, do not prevail in this body.' *Cong. Rec.* (March 17, 1910), 3271, 3274, 3275; (May 9, 1913), 1430; (March 20, 1914), 5175. 'The Chair must announce that all this discussion has proceeded by unanimous consent. The Senator from Texas has no authority to parcel out time.' Jan. 24, 1933, *Cong. Rec.*, 2359.



can a Senator prescribe the course of the member to whom he has yielded.<sup>1</sup>

The application of this rule as to interruption was well illustrated on the last afternoon of the first session of the sixty-eighth Congress. Spencer secured recognition, and started on a long speech in opposition to approval of the report from the Committee on Public Lands and Surveys, based on the investigation of the naval oil leases. There was a great congestion of business, much of which neither he nor anyone else wished to block. A score of times he was requested to 'yield,' and he did so, each time carefully using a formula which declared that he reserved his right to the floor. A single objection would have prevented every one of these concessions. Finally, warned by the presiding officer that further yielding would take him off the floor, he thereafter declined to be interrupted even for a question, and continued his speech for an hour or more, till its objects had been attained, when he finally yielded the floor.<sup>2</sup>

May a member, while addressing the Senate, be 'taken off his feet' without his own consent? The rules are not explicit upon this point, and the decisions have been contradictory. It has often been ruled that he may be deprived of the floor by a Senator's suggesting the absence of a quorum,<sup>3</sup> but two recent rulings have declared that a Senator, without his consent, may not be taken from the floor by a point of no quorum.<sup>4</sup> Again, it has been held in most sweeping terms that speakers can always be interrupted to make a point of order, yet on one recent occasion the presiding officer ruled that a Senator cannot 'be taken from the floor in the midst of a speech on a point of order.'<sup>5</sup> He is taken from the floor if a motion is made and seconded that the doors of the Senate be closed.<sup>6</sup> But if unfinished business is laid before the Senate while a Senator is in the midst of a speech, he is not deprived of the floor, but may continue, however remote his topic may be from the matter now ostensibly under consideration.<sup>7</sup>

<sup>1</sup> Gilfry, *Senate Precedents*, II, 148, 3. Sept. 18, 1914, it was held that a Senator, having yielded to another member to make a motion to adjourn, thereby lost the floor. *Ibid.*, 153.

<sup>2</sup> His object had apparently been twofold — to prevent the taking of a vote on the adoption of the committee's report, and on the passage of the Postal Salary Bill over the President's veto. *Cong. Rec.*, June 7, 1924.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 427; but see *ibid.*, II, 148.

<sup>4</sup> March 29, 1870. This ruling of the Chair was sustained by the Senate vote of 47 to 12. *Cong. Globe*, 2267; June 10, 1914, *Cong. Rec.*, 10131.

<sup>5</sup> Gilfry, *Senate Precedents*, I, 429. Feb. 22, 1913, *Cong. Rec.*, 3636, 3662.

<sup>6</sup> Gilfry, *Senate Precedents*, I, 430.

<sup>7</sup> *Ibid.*, 431.

## POSITION

The original rules of the Senate required that the Senator shall 'address the Chair, standing in his place, and when he has finished, shall sit down.' By unanimous consent this rule from the first years has been suspended to allow a Senator suffering from disability to sit when speaking, but strict parliamentarians — when occasion arises to check a filibustering speech — hold that the rules require the speaking member to *stand* — and not sit nor walk about.<sup>1</sup> Vice-President Dawes construed the rule to require that 'the Senator shall face the Chair, while speaking,' explaining that it was necessary in order that the official reporters may make an accurate record.

## FORMS OF ADDRESS

The member seeking recognition addresses the presiding officer as 'Mr. President,' who responds: 'The Senator from Alabama,' naming his state. It is a violation of the Senate rules for a member to address another by name. John Sharp Williams once began a speech: 'Now, my friends — if I have a right to call you by that name. I am forbidden by the rules to call you "Gentlemen"'; this is the only body in the world where you cannot call your fellow members "Gentlemen." You must call them "Senators," and nothing else.' The President of the Senate addresses its members as 'Senators,' not as 'Gentlemen of the Senate.'

In the House formal question has been raised as to the form of address. Congressman Luce called attention to the section in Jefferson's *Manual*: 'When any member means to speak he is to stand up in his place uncovered and to address himself not to the House or any particular member but to the Speaker.' He protested against the use of such a loose form as 'Mr. Speaker, ladies and gentlemen.' One member had even added, 'and friends.' (That included the gallery!) In response, Speaker Rainey said: 'The dignified method of procedure is to address the Speaker . . . and thus the member addresses the entire membership. The Chair thinks the rule ought to be followed in the interest of dignity and decorum in the proceedings of the House.' To an inquirer who suggested that the form should be: 'Mr. Speaker and gentlewomen,' he replied: 'When a member addresses "Mr. Speaker," it includes the ladies as well as the gentlemen.'<sup>2</sup> When two Senators had been reminded of their inadvertence by the Chair, Bacon approvingly commented:

<sup>1</sup> March 12, 1925. Page 422, *infra*.

<sup>2</sup> June 6, 1934, *Cong. Rec.*, 10627.

The fundamental rule in parliamentary intercourse is that Senators should only be addressed in the third person: and it is a safeguard against asperities in debate and personalities of all kinds. . . . In the words of Senator Hoar: 'There is but one "You" in the Chamber, and that is the Presiding Officer; "You" can be applied to the Senators as a body and to the Presiding Officer as a representative of the body in its entirety; but it can never under any circumstances be applied to an individual Senator.'<sup>1</sup>

#### UNPARLIAMENTARY LANGUAGE

For more than a century the Senate was content to leave the question of what language was out of order to be determined by general parliamentary law, which, as set forth in Jefferson's *Manual*, forbids digressing 'from the matter to fall upon the person by speaking reviling, nipping, or unmannerly words against a particular member.' Finally a disgraceful wrangle in the Senate ended in an exchange of blows by the two Senators from a Southern state. Upon proposal by Senator Hoar two amendments were added to the rules in 1902 (Rule XIX, cls. 2 and 3):

No Senator in debate shall directly or indirectly, by any form of words, impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.<sup>2</sup>

No Senator in debate shall refer offensively to any State of the Union.<sup>3</sup>

It has long been held to be out of order for a Senator to cause to be read in the Senate a communication from outside imputing unworthy motives or conduct to a Senator.<sup>4</sup> The recipient of such a communication first confers with the Senator attacked before sending it to the desk; when such matter by inadvertence has been read, by direction of the Senate it has been expunged from the record.<sup>5</sup>

<sup>1</sup> May 27, 1909, *Cong. Rec.*, 2431-32.

<sup>2</sup> Jan. 7, 1925, severe criticism was passed upon Dial, who in a Senate speech had blamed Democratic members of Congress for the party's defeat in 1924 by their repudiation of the party's principles. He finally requested that his entire speech be withdrawn from the *Record*.

<sup>3</sup> He declared: 'Such attacks have given rise to a great deal of angry debate in both Houses of Congress.' *Autobiography*, II, 99.

<sup>4</sup> Van Buren confirmed precedent by refusing to have read an attack upon Webster.

<sup>5</sup> Inexperienced Metcalf, a few weeks after entering the Senate, caused to be read a constituent's telegram characterizing certain remarks made by Reed (Mo.) in the Senate as 'scurrilous, venomous, . . . due to ignorance and prejudice.' This violation of the rules was at once protested, and at Smoot's request it was 'expunged from the record.'



In Jefferson's *Manual* it is declared to be a breach of order

in debate to notice what has been said on the same subject in the other House, or the particular votes or majorities on it there, because the opinion of each House should be left to its own independency.<sup>1</sup>

Gorman insisted that the presiding officer 'should stop instantly any Senator who attempts to quote any statement made in the other House,'<sup>2</sup> and Hébourn, a few years later, declared: 'There is no rule that is more useful or more proper than this — that we may not mention the action of the House upon any measure in discussing matters upon the floor.' Cummins, whose remarks called forth the point of order, rejoined: 'I cannot think that the rule extends to that point. . . . I simply referred to what the House had done.'<sup>3</sup> In passing upon a similar point of order in 1915, Vice-President Marshall declared:

The Chair does not think that the Senate has adopted Jefferson's *Manual* as a part of the Rules of the Senate. . . . In the opinion of the present Presiding Officer, it certainly must be left to the discretion of the members of the Senate as to what they will or will not say, provided they do not speak disrespectfully of the proceedings of the other House.<sup>4</sup>

In the Senate someone is ever ready to invoke its Standing Rules or Jefferson's quaintly phrased precepts to insist upon observance of the amenities of debate in every reference to the motives or conduct of a Senator or of a member of the House. But no pertinence seems to be found in Jefferson's words: 'In Parliament, to speak irreverently or seditiously against the King is against order.' Twentieth-century democracy, as represented in the Senate, has scant reverence for 'Kings,' and to Senators of a certain type it never occurs that the self-respect of the Senate might dictate as courteous restraint in debate references to the President, the elected head of a nation of a hundred million citizens, as to fellow members of Congress. From the gallery

<sup>1</sup> In the House *Manual and Digest* (1923) are cited the precedents as to House practice (143-44). By report of its Committee on the Judiciary the speech of R. P. Kennedy, delivered Sept. 3, 1890, was declared to be 'in its references to the Senate, individually and generally, . . . a grave infraction of parliamentary law and an abuse of the privilege of the House.' By a vote of more than four to one the Public Printer was directed to exclude the entire speech from the permanent *Congressional Record*. See Cannon's 'peep-o-day' speech in the House, March 3, 1903. It escaped censure there, but was roundly denounced in the Senate (pp. 462-63).

<sup>2</sup> In debate in the House, June 21, 1921, Rucker had started to say, 'Four or five Senators . . .' but checked himself: 'I know that I am not permitted to mention a Senator's name on this floor. I can criticize my colleagues, . . . but parliamentary usage forbids that I refer to a member of another august body.' (*Cong. Rec.*, 2432.) Another Representative, without incurring censure, referred to action which had been taken in 'another body, sometimes designated as the "Cave of the Winds."'

<sup>3</sup> June 18, 1910, *Cong. Rec.*, 8461.

<sup>4</sup> Jan. 8, 1915, *ibid.*, 1161.

the present writer has heard loose-tongued Senators — with no word of rebuke from the Chair or from the floor — not only apply scurrilous epithets to the President, read ribald rhymes, and make derisive speeches, but also impute to living or recently deceased holders of that high office unworthy motives and complicity in crimes ranging from conspiracy to defraud the Government to actual murder.<sup>1</sup> There is sound reason for insisting that the President's acts should not be exempt from serious, responsible criticism in Senate debate, within the bounds of propriety imposed by the possibility that the Senate may be called upon to sit as a court in his trial upon impeachment charges. But ranting vilification and clownish ridicule of the Chief Executive ought not to be tolerated in Senate debate. In 1914 Overman introduced a proposal so to amend the Rules as to provide that no Senator in debate shall 'in any manner refer disrespectfully or offensively to the President of the United States or the Vice-President.'<sup>2</sup>

#### HOW MAY UNPARLIAMENTARY LANGUAGE IN DEBATE BE CHECKED?

The early rules of the Senate were indefinite as to who might call the offending Senator to order. The Senate was hardly a month old when John Adams called to order Butler, who had 'flamed away, and threatened a dissolution of the Union with regard to his State, as sure as God was in the firmament!'<sup>3</sup> But in 1826 John Randolph was allowed to continue a rancorous tirade, Calhoun taking the position that he as Vice-President had no authority to check him.<sup>4</sup> In 1850 Fillmore, in an elaborate statement to the Senate, asserted his belief that the President of the Senate had this power, and that it might be exercised by him with less embarrassment than by a Senator;<sup>5</sup> but he showed great laxness in enforcing order in debate.<sup>6</sup>

<sup>1</sup> March 6, 1924, Lodge registered his protest against the vilification of the late President in the debate over the oil-lease scandals. Referring to 'a ferocious attack' on President Cleveland, made by Tillman almost as soon as he entered the Senate, he said: 'It did not seem to me that an attack of that kind on the President ought to be in order or could be in order. I was informed there was no rule which protected the President of the United States, whoever he might be, from any attack that any Senator might see fit to make.' See Vice-President Marshall's statement to the same effect, April 29, 1914. (Gilfry, *Senate Precedents*, II, 189.) He added that it was a question of propriety, of which the Senator himself is the sole and exclusive judge, subject to the Senate's right to expunge what it deems unworthy to remain a part of the permanent Record of the Senate.

See report adopted by the House (Jan. 27, 1909, *Cong. Rec.*, 1465, as to decorum in debate, and the duty of the House to preserve 'proper restraint.' For criticism of a Representative's slanderous references to the President, see *ibid.*, 571, Dec. 15, 1931.

<sup>2</sup> April 4, 1914.

<sup>3</sup> Maclay, *Journal*, 74, June 11 and 12, 1789.

<sup>4</sup> Gale and Seaton, *Register*, 571-73, April 15, 1826.

<sup>5</sup> April 3, 1850, *Senate Journal*, 248; Gilfry, *Senate Precedents*, I, 567-70.

<sup>6</sup> Page 215.

The rules now provide:

If any Senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may, call him to order; and when a Senator shall be called to order he shall sit down, and not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order, which motion shall be determined without debate.

If a Senator be called to order for words spoken in debate, upon the demand of the Senator or of any other Senator the objectionable words shall be taken down in writing, and read at the table for the information of the Senate.

Whenever confusion arises in the Chamber or the galleries, or demonstrations of approval or disapproval are indulged in by the occupants of the galleries, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator. (Rule XIX, pars. 3, 4, 5, and 6.)

In a few instances Senators have been called to order for using unparliamentary language in regard to the President. When Saulsbury, in a maudlin harangue, said, 'I never did see or converse with so weak or imbecile a man as Abraham Lincoln, President of the United States,' he was ruled out of order, and, as he persisted in speaking after ordered to sit down, the Vice-President directed that the Sergeant-at-Arms take him in charge for disorderly conduct.<sup>1</sup> He later made humble apology to the Senate. Charles Sumner was called to order, January 1, 1867, for saying that never before had we had 'a President who has become the enemy of his country.' But the presiding officer ruled that in the opinion of the Chair the language did not transcend the latitude of debate theretofore allowed in the Senate, and was therefore not out of order.<sup>2</sup> In later debate Sumner's denunciation of Johnson became even more bitter.

Presiding officers have usually been inclined to rule that the language to which exception has been taken is within the limit of tolerance, and have been sustained by the Senate.<sup>3</sup> When Garrett Davis said in debate, 'Sir, I think there ought to be inscribed on his [Henry Wilson's] most impudent front the words, "The self-constituted gagger of the Senate,"' he was called to order by Wilson. The Chair decided that Davis's words violated the rule of the Senate, but by vote he was allowed to proceed in order.<sup>4</sup> In the heated debates of

<sup>1</sup> Furber, *Precedents*, 123; Gilfry, *Senate Precedents*, I, 414. *Cong. Globe*, 549, Jan. 27, 1863.

<sup>2</sup> Jan. 17, 1867, Gilfry, *Senate Precedents*, I, 415; *Cong. Globe*, 525-28.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 413-15.

<sup>4</sup> Feb. 17, 1864.



Reconstruction days, Thurman, as President *pro tempore*, ruled that Morgan's inquiry, 'Has the Senator from Louisiana (Kellogg) any objection to the Committee . . . investigating the question whether or not he bribed the members of the legislature which elected him?' contained 'no imputation upon the Senator from Louisiana, and were in order';<sup>1</sup> and two days later Thurman ruled that Zachariah Chandler's charge, 'By fraud and violence you occupy your seats,' referring to 'twelve Senators on that side of the Chamber,' was not out of order.<sup>2</sup>

#### CHARGES OF UNTRUTH

Inevitably in the Senate's debates of nearly a century and a half its members have from time to time found that 'the quarrel was upon the seventh cause — upon a lie seven times removed.' Senatorial phrases have run the whole range from 'the Reply churlish' to the 'Counter-check quarrelsome, and so to the Lie circumstantial, and the Lie direct.' Discriminations have been drawn that have out-Touchstoned Touchstone. When Benton characterized certain of Calhoun's statements as 'a bold and direct attack on truth,' the Chair decided that, understanding the words used by Benton as intended only to deny the truth of charges which he considered to have been made against himself, and 'not intended to impeach the personal veracity of the Senator from South Carolina, he did not consider them to be out of order.' Webster appealed from this decision, but the Chair was sustained.<sup>3</sup>

In some instances the lie direct has been passed in most contemptuous terms, yet without evoking a reproof from the Chair or from the floor.<sup>4</sup> Cummins drew a hair-line in declaring that any Senator, charging him with attempting to prevent a vote upon a certain bill, '*falsifies* — I wish I could use a stronger term and still be within the range of the Senate.'<sup>5</sup> In a recent instance a Senator sought instruction in advance as to what form of language was permissible, but in so doing freed his mind after this fashion: 'Mr. President, I wish to know if there is any way under the parliamentary rules of the Senate whereby one member may refer to another as a wilful, malicious

<sup>1</sup> May 7, 1879, *Cong. Rec.*, 1120-21.

<sup>2</sup> May 9, 1879, *ibid.*, 1188.

<sup>3</sup> Gilfry, *Senate Precedents*, I, 413.

<sup>4</sup> Harsher invective is hardly to be found than that of Lamar against Conkling, and of Voorhees against Ingalls, cited by David Barry, *Forty Years in Washington*, 72 and 96-99.

<sup>5</sup> March 8, 1917.

liar?' Pandemonium broke loose, a dozen men crying, 'Point of order!' or insisting that the question be withdrawn. Attention was drawn to the fact that earlier in the day the angry Senator had himself repeatedly violated the Senate rules by imputing unworthy motives to the Senator to whose words he was now taking exception. A motion that he be allowed to 'proceed in order' was rejected. When he persisted in seeking instruction, one of the Senate's leading parliamentarians informed him that he could say that the Senator's statement was 'entirely without foundation,' or that it was 'unsupported,' or even that it was 'untrue.' Thus coached, he declared: 'The charges made by the Senator from Michigan, I will say, in parliamentary language, are as much without foundation as it is possible for any charges to be.'<sup>1</sup> This periphrasis recalls a similar episode in the House of Commons. A fiery Laborite, Jack Jones, had twice shouted at Lady Astor that she was a liar. The House was in an uproar. To cries of 'Withdraw! Withdraw!' he replied: 'I won't withdraw!' The Chairman insisted that he withdraw the expression, which Jones at last did, as follows: 'I apologize to the Honorable Lady, and will substitute the phrase "terminological inexactitude"!'<sup>2</sup>

## LIMITATION OF DEBATE

### THE PREVIOUS QUESTION

The previous question being moved and seconded, the question from the Chair shall be: 'Shall the main question be now put?' And if the nays prevail, the main question shall not then be put. (Rule IX. Adopted April 16, 1789.)<sup>3</sup>

<sup>1</sup> March 14, 1925. Washington dispatch to *New York Times*, March 15.

<sup>2</sup> July 8, 1926. London dispatch in *Boston Herald*, July 9.

<sup>3</sup> Rule VIII made privileged a motion 'for the previous question.' As evidence that privileges of unlimited debate were not originally possessed by the Senate, H. J. Ford (*Rise and Growth of American Politics*, 265), quoted the following as a 'rule adopted at the first session': 'In case of a debate becoming tedious, four Senators may ask for the question; or the same number may at any time move for the previous question, viz. "Shall the main question be now put?"' and added: 'This expedient for shutting off debate was freely used.' More cautiously, Miss Kerr (*op. cit.*, 60, no. 2) says that Maclay gave this as a rule of the Senate, but added: 'I can find no confirmation of this rule.' Maclay was a member of the committee which drew up the Senate rules of

To one familiar with the frequent present-day use of the previous question in the House of Representatives as an effective form of closure, this rule gives an entirely erroneous impression of the Senate's original practice. For the Senators who framed that rule intended that the previous question should serve — as it had in the Parliament of Great Britain, and as they had themselves known it to serve in the Continental Congress — as 'a device for removing from consideration a question which might seem to the majority undesirable to discuss further or act upon.'<sup>1</sup> Asher C. Hinds, author of the monumental *Precedents of the House of Representatives*, commented on the rule of 1784, on which the previous-question rules of the House and Senate were modeled five years later, 'There was no intention of providing thereby a means of closing debate in order to bring the pending question to an immediate vote,' and Senator Lodge declared: 'It was not in practice a form of closure, and it is, therefore, correct to say that the power of closing debate in the modern sense has never existed in the Senate.' The previous question was but rarely used in the Senate.<sup>2</sup> In his farewell address to the Senate, Vice-President Aaron Burr recommended the discarding of the previous question, saying that in the preceding four years it has been taken but once, and then upon an amendment. He regarded this as proof that it could not be necessary, and in his opinion all its purposes were much better

1789, and this 'rule,' cited by these two students of Senate development, is 'No. 7' upon what seems to have been Maclay's memorandum of the proposals which he himself drew up for consideration by that committee. It is found upon a loose leaf in the first volume of the manuscript of his *Journal* in the Library of Congress, and was printed at the beginning of the second edition of the *Journal*.

<sup>1</sup> Jefferson's *Manual*, sec. XXXIV, declared that 'the proper occasion for the previous question is when a subject is brought forward of a delicate nature . . . the discussion of which may call forth observations which might be of injurious consequences.' He concluded that 'its uses would be as well answered by other more simple parliamentary forms, and therefore it should not be favored, but restricted within as narrow limits as possible.' For discussion of the development of the use of the previous question in the Senate as compared with its use in the House, see: Hinds, *Precedents of the House of Representatives*, V, secs. 5445 ff.; T. B. Reed, *Parliamentary Rules*, secs. 123-25; Robert Luce, *Legislative Procedure*, 270-77, 289-92; De A. V. Alexander, *History and Precedents of the House of Representatives*, ch. VIII, and 184 ff.

<sup>2</sup> There is evidence that in the practice of the Senate and of the House the passing of the motion for the previous question shut off debate only theoretically. Maclay's motion that 'six dollars' be struck out and 'five dollars' inserted in the compensation bill led to disorderly and abusive debate, in the midst of which 'Izard moved for the previous question. He was replied to that this would not smother the motion.' (*Journal*, August 28, 1789.) In Congress as in Parliament the motion was at times made with the intention of the mover and seconder to vote against it; and, despite the formula in the rule, it was repeatedly made in negative form — 'that the main question be not now put.' For two instances of this, see *Senate Executive Journal*, Jan. 12 and 16, 1792.



answered by the question of indefinite postponement.<sup>1</sup> In the revision of the Senate rules of March 26, 1806, the previous question was dropped, and has never been restored.

For a full generation there developed no serious demand for more stringent limitation of debate.<sup>2</sup> But by 1840 the minority's dilatory tactics<sup>3</sup> and abuse of the privilege of unlimited debate led Clay to declare himself 'ready for the adoption of a rule which would place the business of the Senate under the control of the majority of the Senate.' His proposed remedy was the adoption of the 'hour rule.'<sup>4</sup> When this proposal proved unpopular, the previous question was advanced as a compromise, but for this he could not get majority support. In Benton's exultant words:

Thus the firmness of the minority in the Senate — it may be said, their courage, for their intended resistance contemplated any possible extremity — saved the body from degradation — constitutional legislation from suppression — the liberty of speech from extinction, and the honor of republican government from a disgrace to which the people's representatives are not subjected in any monarchy in Europe. The

<sup>1</sup> *Senate Journal*, 65-66. Gilfry, *Senate Precedents*, I, 402.

That an affirmative vote on the previous-question motion in the opinion of Congressmen of this period did not preclude all further debate on the main question is evident from a debate in the House, a year after the previous question had passed out of the Senate rules. The Speaker called to order a member who was proceeding to debate after the main question had been ordered. From this decision John Randolph appealed and a long debate ensued as to the Speaker's interpretation of the word 'now' in the form, 'Shall the main question be now put?' Randolph insisted that 'though the question was to be immediately put, yet it was competent for any Member, as in other cases, to rise and debate the subject.' The Speaker was overruled by the overwhelming vote of 103 nays to 14 yeas. (Dec. 15, 1807, *Annals of Congress*, 1182-84.) Contrary to his own opinion, but in accordance with this vote, Feb. 1, 1808, the Speaker ruled that debate was in order, after an affirmative decision of the previous question. But when, Feb. 27, 1811, the same Speaker held that the long-winded Gardinier was in order, he was overruled by a vote of 16 to 113. 'So it was finally decided that there could be no debate after the previous question was ordered.' Hinds, *Senate Precedents*, V, sec. 5445.

<sup>2</sup> From the beginning, Senate debate had been subject to the requirements that no motion should be debated until seconded; that no member should speak more than twice in any one debate on the same day without leave of the Senate, and that every question of order should be decided by the President without debate (Rules VI, IV, and XVI, of 1789). In 1806 a motion to adjourn was made not debatable, and in 1807 the same restriction was applied to an amendment of the third reading of a bill. (Rule VI, and *Senate Journal*, IV, 135, 138, 139.)

<sup>3</sup> 'Near forty propositions of amendment were offered to the first fiscal agent bill alone — the yeas and nays taken upon them thirty-seven times.' Benton, *op. cit.*, II, 247.

<sup>4</sup> Benton characterized the adoption of the hour rule by the House as 'the largest limitation upon the freedom of debate which any deliberative assembly ever imposed upon itself. It presents an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance.' *Ibid.*, 247.

previous question has not been called in the British House of Commons in one hundred years — and never in the House of Peers.<sup>1</sup>

As the volume of business increased, from time to time there were advanced proposals for restricting debate,<sup>2</sup> but none got beyond the stage of being printed or referred to a committee until in the stress of the Civil War, when it was provided that, in secret-session consideration of matters relating to the war, on which the President desired immediate action, debate should be confined to the subject matter, and limited to five minutes, except that five minutes be allowed any member to explain or oppose a pertinent amendment.<sup>3</sup>

Appropriation bills engrossed so much of the Senate's time that the necessity of some limitation upon debate first became convincing in regard to them. A substantial gain was accomplished by the adoption of the rule that an amendment to an appropriation bill might be laid on the table without prejudice to the bill.<sup>4</sup> (So successful did this prove that its application was later extended to an amendment upon *any* pending measure.)<sup>5</sup> To hasten action upon appropriation bills it became customary in the closing days of a session to apply a five-minute limit upon debate of them, and April 29, 1872, the Senate agreed to a resolution that during that session it should be in order, pending an appropriation bill, to confine debate upon amendments thereto to five minutes by any Senator on the pending motion.

Senate business was greatly expedited by the adoption of the so-called 'Anthony Rule.' First introduced February 5, 1880, to reduce the congestion of bills then existing, it brought such relief from the scrambling for precedence which theretofore had often consumed many hours that from time to time it was adopted in succeeding sessions, and soon found its way into the Standing Rules, where it now appears as Rule VIII:

At the conclusion of the morning business for each day, unless upon motion the Senate shall at any time otherwise order, the Senate will proceed to the consideration of the Calendar of Bills and Resolutions,

<sup>1</sup> In the debate, Calhoun had summarized the history of the previous question in the House, declaring his impression that it had been called there only four times in seventeen years. Conveniently forgetful of the rantings which he had allowed to go unrebuked while presiding over the Senate, he declared: 'There never had been a body in this or any other country in which, for such a length of time, so much dignity and decorum of debate had been maintained.'

<sup>2</sup> July 27, 1850, Douglas introduced a resolution for the admission of the previous question.

<sup>3</sup> Jan. 29-30, 1862, *Senate Journal*, 154.

<sup>4</sup> Feb. 22, 1875. Gilfry, *Senate Precedents*, I, 544.

<sup>5</sup> Rule XVII.

and continue such consideration until 2 o'clock; and bills and resolutions that are not objected to shall be taken up in their order, and each Senator shall be entitled to speak once and for five minutes only upon any question; and the objection may be interposed at any stage of the proceedings, but upon motion the Senate may continue such consideration: . . . But if the Senate shall proceed with the consideration of any matter notwithstanding an objection, the foregoing provisions touching debate shall not apply.

This procedure makes possible rapid action upon a vast number of bills and resolutions, to the satisfaction of everyone, since a single 'Object!' or 'Over!' when the title of the measure is read, prevents curtailment of debate upon the specific measure which any member thus insists should receive more deliberate consideration. When the calendar becomes congested, special times in addition to the regular morning hour are often designated for the call of the calendar.<sup>1</sup>

In the years soon after the Civil War, repeatedly motions were made with the object of empowering the Senate, after a bill had been under consideration for a reasonable time, by a simple or special majority to fix a time when debate should close and a vote be taken but none of these attempts to place general restrictions upon the Senate's right to debate secured favorable committee action. The only recourse was by a unanimous-consent agreement as to an individual measure to impose a limit upon the length of the speeches, and to set a time for the vote.<sup>2</sup> Such agreements are not difficult to secure, if the issue is not bitterly divisive, and if the majority consents to a reasonable allowance for debate. Since the adoption of the Cloture Rule in 1917, it has been repeatedly evident that Senators much prefer to end debate and get to a final vote by way of a unanimous-consent agreement with its appeal to senatorial courtesy, rather than under the compulsion of a cloture, which may prove a precedent of evil omen.<sup>3</sup>

#### FILIBUSTERING IN THE SENATE

Even as early as 1841 Benton and his associates were prepared to resort to 'any possible extremity' in their minority resistance to Clay's efforts to put a check upon Senate debate.<sup>4</sup> In 1865 Charles

<sup>1</sup> Rule VIII, abridged. The original 'Anthony Rule' is quoted by Miss C. H. Kerr, *op. cit.*, 63.

<sup>2</sup> Furber (*Precedents*) refers to such motions of Feb. 13, 1869, March 10 and April 14, 1870, and March 18, 1873.

<sup>3</sup> For forms of such agreements, see Gilfry, *Senate Precedents*, I, 614-15.

<sup>4</sup> Page 394.



Sumner declared himself 'justified in employing all the instruments that I find in the arsenal of parliamentary warfare,'<sup>1</sup> and without hesitation he did use riders, dilatory motions, objections, talking against time, and with the aid of a few other Senators succeeded in preventing a vote upon the recognition of Louisiana. But in most filibusters of recent years other forms of obstruction have been mere aids — the chief reliance has been upon unlimited debate to wear-down opposition or to prevent action by holding the floor against all other claimants until the fall of the gavel should end the session at the hour fixed by law or by unanimous consent.

The past fifty years have seen many notable controversies in which the minority Senators have strained to the limit the extraordinary powers of obstruction placed at their command by the rules of the Senate. Thus, in 1879 the minority forced the abandonment of the attempt, by a rider on an army appropriation bill, to repeal the then existing election laws, which authorized the use of the army 'to keep the peace at the polls.'<sup>2</sup> In 1881 the Republicans, having just secured a majority in the Senate, sought at once, in the special session following Garfield's inauguration, to reap the fruits of victory by placing Republicans in certain Senate offices.<sup>3</sup> The Democrats resisted, and carried on their obstruction not only by long speeches but by breaking a quorum, and by motions to adjourn and to go into executive session. The controversy lasted for nearly seven weeks, and the majority finally had to abandon its purpose. This struggle brought severe criticism upon the Senate, the public finding scant evidence of patriotic service in so long a fight over a few petty offices.

In the second session of the Fifty-First Congress the Democrats, though in small minority, conducted a most effective filibuster against the so-called 'Force Bill.' After that measure had been under debate for nearly seven weeks, the Republicans tried to pass a resolution which would have made it possible for the rest of the session by majority vote to fix a time when a measure which had been 'under consideration for a considerable time' should be brought to a vote, every Senator who might so desire having first been 'permitted to speak upon the measure, including all amendments, not more than once, and not exceeding thirty minutes.'<sup>4</sup> This proposal encountered

<sup>1</sup> Feb. 25, 1865, *Cong. Globe*, 1108.

<sup>2</sup> Miss C. H. Kerr, *op. cit.*, 65.

<sup>3</sup> *Ibid.*, 65-66. For Arthur's use of the casting vote on the election of Senate standing committees, see p. 236.

<sup>4</sup> In the previous session three several proposals had been submitted by Republican Senators for some method of closing debate — by Chandler, Blair, and Hoar. (Senate

most stubborn opposition. In the final stages of the struggle the legislative day of January 22, 1891, was continued by recess till January 26, when at last some Republican Senators joined with the Democrats and voted to proceed to the consideration of another bill.<sup>1</sup>

Two years later issue was again joined, over the repeal of the silver-purchase clause of the Sherman Act of 1890. For more than two months by long speeches and dilatory motions the minority prevented the taking of a vote. Popular resentment was less aroused by the length of the deadlock than by the minority's avowed intent — as a matter of constitutional right — to obstruct legislation by every means at their disposal. Speeches four days long, filling the pages of the *Congressional Record* but emptying the Senate Chamber, quorum calls, and dilatory motions killed week after week. Without avail the majority urged changes of the rules which would force a vote. They resorted to an all-night session, but that failed to exhaust the flow of words.<sup>2</sup> Yet the majority hesitated to pursue the drastic action which even such constitutional authorities as Judge Cooley suggested, nor was the Vice-President willing to make himself their tool, by refusing to recognize members of the minority.<sup>3</sup> After the opposition had talked itself out, the repeal motion was brought to a vote and carried.

With this struggle fresh in mind, Senator Lodge wrote:

Of the two rights (of debating and of voting) that of voting is the higher and more important. We ought to have both, and debate certainly in ample measure; but if we are forced to choose between them, the right of action must prevail over the right of discussion. To vote without debating is perilous, but to debate and never vote is imbecile.

As it is, there must be a change, for the delays which now take place are discrediting the Senate, and this is greatly to be deplored. The Senate was perhaps the greatest single achievement of the makers of the Constitution, and anything which lowers it in the eyes of the people is a most serious matter. . . . A body which cannot govern itself will not

*Journal*, 250; 449 and 463; 460.) This resolution by Aldrich was a modification of Hoar's proposal, with additional provisions for curbing dilatory motions. Gilfry, *Senate Precedents*, I, 403.

<sup>1</sup> Robert Luce, *Legislative Procedure*, 291.

<sup>2</sup> This device had frequently served to break such deadlocks. The first night session is said to have been that of Dec. 26, 1836, held to secure a vote on the 'expunging resolution' (p. 979). They often failed to obtain their object. Henry Wilson declared that in twelve years of service in the Senate he had never known anything to be gained by the policy of night sessions. Miss C. H. Kerr, *op. cit.*, 68.

<sup>3</sup> 'Members of the majority should make the proper motions looking to definite and final action on the pending measure, and the presiding officer should recognize them, since only in that way can the inalienable right of the Senate to express its will be exercised.' Judge T. M. Cooley, quoted by Miss C. H. Kerr, *op. cit.*, 67.

long hold the respect of the people who have chosen it to govern the country. . . .

No minority is ever to blame for obstruction. If the rules permit them to obstruct, they are lawfully entitled to use those rules in order to stop a measure which they deem injurious. The blame for obstruction rests with the *majority*, and if there is obstruction, it is because the majority permits it. The majority to which I have reference is the party majority in control of the Chamber.

There was never a time when they (the Democratic majority in the struggle over the repeal of the silver-purchase clause) could not have brought about a vote with the assistance of the Chair, whose occupant was of their party, if, as a party, they had only chosen to do so.<sup>1</sup>

In his opinion an adequate remedy was to be found in a simple change in the rules — giving to the majority power to fix a time for taking a vote upon any measure which had been before the Senate and under discussion, say for thirty days.

#### *Filibustering by Long Speeches*

I gave my opinion in plain language that the confidence of the people was departing from us, owing to our unreasonable delays.

The design of the Virginians and of the South Carolina gentlemen was to talk away the time, so that we could not get the bill passed.

Such were the criticisms which Senator William Maclay was passing upon his colleagues when the Senate of the United States had been organized less than six months! The bill which even then was being 'talked to death' was the one locating the 'permanent residence' — the National Capital! Apparently speechifying is the Senate's vital breath, the Senate's native air. Yet it did not reach its extreme development as a filibustering device until the early years of the new century, when Senate non-stop oratory as an endurance test came to deserve rank with other feats of endless iteration like six-day bicycle contests, or the swimming of the English Channel.<sup>2</sup> Each major physical contest develops its own technique for the conserving of energy. The leader of a Senate filibuster often begins his speech from behind a barricade of volumes of the *Congressional Record*

<sup>1</sup> H. C. Lodge, 'The Struggle in the Senate,' *North American Review*, 1893; reprinted in *Cong. Rec.*, Feb. 13, 1915.

<sup>2</sup> For an apotheosis of the filibuster as a physical test, see Robert Luce, *Legislative Procedure*, 300. 'It is physical sacrifice and in essence no whit different from trial by battle, the ordeal, the duel, war itself.' Many a filibuster has been conducted with patriotic purpose and grim determination, at serious risk of health. (It is said that the aged Gallinger's eight-hour speech in the Shipping Bill filibuster of 1915 'hastened his death.') But not all filibusters fit into a picture of saintly heroism, intent on 'the determining of right and wrong by physical sacrifice.' See Blease (p. 408, n. 1); Stone (p. 422); Long (p. 413).



reports, and other documents. One or two friends must be on the floor to pursue a policy of watchful waiting; the rest of his supporters may be resting or preparing for their own relay, their very absence from the Chamber making more difficult the process of securing a quorum and thus affording a respite to the speaker. If he lacks for ideas or for words, the bulky tomes upon his desk afford limitless matter for reference and quotation which no Senate rule requires shall be in the least relevant. If his voice grows husky or his legs unsteady, he may send a volume to the desk, that the Clerk may read designated passages as parts of his speech. A friendly question may be so elaborated as to give him a chance to relax. A quorum call takes not less than six minutes, and the reading of a lengthy excerpt from the *Record* or a public document may suffice for a hearty lunch. Meantime, the Senate is continuously in session, the majority leader is within call, and official stenographers, in weary relays, are taking down this forensic triumph, which in its entirety may prove serviceable, as a 'quotation,' to some non-stop orator of a later year.<sup>1</sup>

Thus did Carter, defeated for re-election to the Senate from Montana, in the closing hours of the Fifty-Sixth Congress, talk to death the pending River and Harbor Bill in a speech of fourteen hours. Had the bill been brought to a vote, it is certain that it would have been passed — and that it would then have been vetoed. But that Carter was not 'thwarting the will of the majority' was evidenced by the fact that at the end of his oration he was surrounded by a throng of grateful Senators and Representatives, eager to thank him for saving them from the necessity of voting on a bill in which they did not believe, but which contained 'pork' for every one of their states.<sup>2</sup> The President, also, had been saved from the embarrassment of having to veto a bill that 'contained so many votes'; and within a week the 'lame-duck' orator received his reward in the form of a three-year appointment as a commissioner of the St. Louis Exposition, at an annual salary of five thousand dollars.<sup>3</sup>

<sup>1</sup> In the Democratic filibuster of Feb., 1923, against the Republican Ship-Subsidy Bill, it was announced on the floor of the Senate that one Democratic Senator was prepared to read the eleven-hour speech which Smoot had delivered in the 1915 Republican filibuster against the Democratic Ship-Subsidy Bill. Press reports, Feb. 21.

<sup>2</sup> Senator Beveridge, who witnessed this spectacle, said: 'The bill was so full of appropriations for their States and districts that they dared not vote against it, and yet it proposed such a draft on the nation's treasury that they did not want to vote for it.' *Boston Herald*, May 24, 1925.

For 'Outstanding Filibusters, 1841 to 1923,' see *Congressional Digest*, V, 292 ff., Nov., 1926.

<sup>3</sup> Press reporters figured that this amounted to pay at the rate of 34 cents a word for his speech of 44,250 words.

In a filibuster against the Vreeland-Aldrich Currency Bill, May 29 to 30, 1908, Robert M. La Follette held control of the floor for eighteen hours and twenty-three minutes. But during this ordeal he was relieved by many dilatory roll-calls. Fifteen times the Senator himself 'raised a question of the presence of a quorum,' and four times he 'yielded' to enable some friendly colleague to raise that question.<sup>1</sup> Each of these filibustering roll-calls consumed at least six minutes, so that they occupied some two hours or more of the time during which he 'held the floor.' When for the nineteenth time this question was raised, Aldrich, author of the bill against which the filibuster was being conducted, raised the point that, no business having intervened since a roll-call had disclosed the presence of a quorum, the suggestion of absence of a quorum was not in order. The Vice-President submitted the question to the Senate which by a vote of 35 to 8 decided that the point was well taken. After continuing his speech La Follette again raised the quorum question, but the Vice-President, citing the decision just made by the Senate, ruled that the question was not in order. La Follette's appeal from this ruling was tabled by a vote of 33 to 8. Reversing former precedent, by heavy majorities the Senate thus twice decided that debate is not 'intervening business.' Adherence to this ruling takes from the obstructionist Senator the recourse that formerly gave him his readiest relief.<sup>2</sup>

The real record for continuous speech in the Senate was long held by Smoot, who for eleven hours and twenty-five minutes — from the going down of the sun, January 27, 1915, to the uprising of the same — 'without a single moment's relief' spoke against the pending Ship-Purchase Bill, in a filibuster that resulted in the defeat of the measure. For the most part, this portentously long speech was a straightforward presentation of pertinent argument.<sup>3</sup>

<sup>1</sup> After this speech had been proceeding for about two hours, one roll-call rapidly succeeding another, Gallinger raised the point of order, that La Follette had a clerk keeping count of the Senators in the Chamber in order to inform the speaker when a quorum was lacking. The Vice-President sustained Gallinger's point that such counting of quorums was not 'official business' as intended in the rule authorizing the presence of a Senator's clerk upon the floor.

<sup>2</sup> April 20, 1872, the Chair had ruled that debate is 'intervening business' (Gilfry, *Senate Precedents*, I, 241), but since 1908 the above votes have been repeatedly cited and followed (*ibid.*, II, 134-35). But note the hesitating ruling of May 2, 1914 (*Cong. Rec.*, 7619).

<sup>3</sup> In this same filibuster Jones (Wash.) occupied the floor for thirteen hours, but with many interruptions. Gallinger, aged seventy-eight, spoke for seven hours and twenty minutes, and two days later again spoke for nearly five hours. (Carter Field,

## • ADOPTION OF THE CLOTURE RULE OF 1917

February 3, 1917, President Wilson came before the Senate and the House in joint assembly to announce the severance of diplomatic relations with Germany.<sup>1</sup> Anxiety as to the safety of the lives and property of Americans upon the high seas became tense, and toward the end of the session — in the midst of a congestion of supply bills which it was charged had been purposely delayed by filibustering Republicans, in order to force the calling of a special session — there were introduced bills authorizing the President to arm merchant vessels and to protect American citizens in their peaceful pursuits upon the sea. The House adopted the recommendation of its Committee on Rules that but three hours be allowed for general debate confined to the subject matter of the bill, and on that very day passed the measure by a vote of 403 to 14.<sup>2</sup> In the Senate the Committee on Foreign Relations did not report the measure till the session of March 2 was well advanced. Vigorous opposition developed, and it became evident that it could not be brought to a vote before noon of March 4. On the last morning of the session there was presented a statement signed by seventy-five Senators declaring that they favored the passage of the pending measure. It ended thus:

We desire this statement entered in the *Record* to establish the fact that the Senate favors the legislation and would pass it, if a vote could be had.<sup>3</sup>

On the very day when more than three-fourths of the Senators joined in this humiliating avowal of the Senate's impotence to act, President Wilson issued a public statement in which he declared:

In the immediate presence of a crisis fraught with more subtle and far-reaching possibilities of national danger than any the Government has known within the whole history of its international relations, the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than 500 of the 531 members of the two Houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven Senators had determined that it should not. . . . The Senate of the United

*Outlook*, March 25, 1925.) See Smoot's speech, Jan. 29, 1915, *Cong. Rec.*, 2592-2620. The history of early notable filibusters is well set forth in 'Filibusters in the Senate,' *Editorial Research Reports*, March 13, 1925. Dr. W. F. Willoughby discussed the pros and cons of obstruction in chapter 29, *Principles of Legislative Organization and Administration*.

<sup>1</sup> *Cong. Rec.*, 2550.

<sup>2</sup> H. R. 21052, passed by the House, March 1, 1917, *ibid.*, 4692.

<sup>3</sup> March 4, 1917, *ibid.*, 4988.



States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of wilful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible. . . .

The only remedy is that the rules of the Senate shall be so altered that it can act. The country can be relied on to draw the moral. I believe that the Senate can be relied on to supply the means of action and save the country from disaster.<sup>1</sup>

On that same day there was also made public a pledge, signed by thirty-three Senators, headed by Simmons, Robinson, Lodge and Borah:

to co-operate with each other in compelling such changes in the rules of the Senate as to terminate successful filibustering and enable the majority to fix an hour for disposing of any bill or question subject to the rule of one hour to each Senator for discussion before or after the hour is fixed.<sup>2</sup>

The result was that the long-discussed modification of the rules came with a rush. On the third day of the special session, March 8, 1917, Martin, the Democratic leader, presented the proposed rule, which had been formulated by a conference committee of five Democrats and five Republicans named by their respective party organizations, and which had already been submitted to and approved by them.<sup>3</sup>

The most vigorous opposition came from La Follette.

Believing that I stand for democracy, for the liberties of the people of this country, for the perpetuation of our free institutions, I shall stand while I am a member of this body against any cloture that denies free and unlimited debate. Sir, the moment that the majority imposes the restriction contained in the pending rule, that moment you will have dealt a blow to liberty, you will have broken down one of the greatest weapons against wrong and oppression that the members of this body possess. [He championed] the constitutional right . . . reposed in a member of this body to halt a Congress or a session on a piece of legislation which may undermine the liberties of the people and be in violation of the Constitution which Senators have sworn to support.<sup>4</sup>

<sup>1</sup> Press reports of March 4. The leaders of this group were 'Stone of the Missouri Democratic machine; O'Gorman, the Irishman of Tammany Hall connections; Clapp of Minnesota; La Follette of Wisconsin. The German of Missouri, Irish of New York, and the German-Swedish of the North West were the motor forces behind these "wilful men," as Wilson characterized them.' (W. E. Dodd, *Woodrow Wilson and His Work*, 217-18.) The Senate's resentment at the President's statement appears in the debate of March 8. See Townsend's speech, *Cong. Rec.*, 36.

<sup>2</sup> Dispatch in *Boston Herald* of March 5, 1917.

<sup>3</sup> According to press dispatches the proposed rule was endorsed by the Democrats and by a vote of 30 to 2 by the Republicans.

<sup>4</sup> *Cong. Rec.*, 44. He quoted from a noble speech by George Gray of Jan. 22, 1891. Editors, the country over, pointed out that La Follette, while professing to 'stand for

After only six hours of debate the rule was adopted by a vote of 76 to 3.<sup>1</sup> Doubtless many were brought reluctantly to its support by the tenseness of our foreign relations. For more than a century the Senate had been without any general rule by which a limit could be placed upon debate. The 'Cloture Rule' of March 8, 1917, is as follows:

If at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the presiding officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the presiding officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:

'Is it the sense of the Senate that the debate shall be brought to a close?'

And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the presiding officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the presiding officer, shall be decided without debate. (Rule XXII.)

Obviously this is not cloture as the term is ordinarily understood. Had this procedure been available and immediately applied March 2, 1917, when the bill for arming merchant vessels was reported to the Senate, it would not have brought that measure to a vote, for Congress would have expired before the end of the two-day interval between the notice and the vote as to ending debate. Not only is the limitation slow of application, but the allowance of one hour to each Senator is so generous as to make La Follette's protest seem fantastic.<sup>2</sup> Those who drafted the rule predicted that it would be

democracy,' was insisting upon a 'liberum veto' such as in Poland had amounted to anarchism and had rendered that country impotent in face of its greedy neighbors. *Boston Herald* editorial, March 7, 1917.

<sup>1</sup> La Follette, Gronna, and Sherman.

<sup>2</sup> Probably the most serious disadvantage which may result in the working of the cloture was thus stated by Borah: 'Under this cloture rule it is impossible to deal

seldom used, and then only to prevent the defeat of legislation by a very few men.

### *A Decade of Experience with the Cloture Rule*

These forecasts have been fulfilled. The efficacy of this rule for the most part inheres in the consciousness that it is available rather than in its actual use. In the ten years following the adoption of this rule, although resort to cloture was broached in several controversies, only five times was the Senate brought to a vote upon a cloture motion, and only four times was the limitation on debate actually applied.<sup>1</sup>

In November, 1919, when it seemed evident that five 'irreconcilables' intended to keep the ratification of the Treaty of Versailles under debate until the end of the session, a cloture motion signed mainly by Democrats was submitted, but was held by the Chair to be out of order, since it sought to limit debate only on the proposed reservations.<sup>2</sup> Later, on the same day, November 13, Lodge, chairman of the Committee on Foreign Relations, filed a cloture motion signed by thirty Republicans,<sup>3</sup> and two days later this was adopted by a vote of 78 to 16. Debate under the cloture rule began at once, and continued during the sessions of four days, occupying in all about twenty hours. At least fifty Senators took part in the debate, but not more than ten of them availed themselves of the full one-hour allowance.<sup>4</sup> The final vote was taken at the end of the session of November 19.

with the question in the way of amendment, and to explain and to discuss the amendments as they come up as you do under the general rule. You are limited to an hour's discussion. If the hour takes place before some vital and important amendment is offered, you are absolutely precluded from discussing it.' Aug. 27, 1917, *Cong. Rec.*, 6374.

<sup>1</sup> In August, 1917, an undated cloture motion was circulated, but this did not materialize (*ibid.*, 6374). Sept. 2, 1919, after La Follette on five consecutive days had held the floor speaking against the Mineral-Land Leasing Bill, Thomas gave notice that he would seek to invoke the cloture rule, unless the bill were disposed of the following day. The next day it was brought to a vote and passed. March 12, 1925, in the midst of Copeland's filibuster against the Isle of Pines Treaty, Curtis, Republican leader, introduced a cloture motion (*ibid.*, 156), but the collapse of Copeland's obstruction made further procedure unnecessary.

<sup>2</sup> For Hitchcock's motion, see *Cong. Rec.*, 8413. It led to important debate on the interpretation of Rule XXII. President *pro tempore's* ruling, *ibid.*, 8417. Professor Rogers (*The American Senate*, 178) confuses Hitchcock's motion (which was not voted on) with Lodge's.

<sup>3</sup> *Ibid.*, 8437.

<sup>4</sup> In the debate under this first application of the Cloture Rule one precedent was set. The presiding officer permitted La Follette, in reply to a question from Gronna,



In 1922, when debate on the Fordney Tariff Bill had dragged on for months, and when it had proved impossible to reach any agreement by unanimous consent for placing a reasonable limit upon its further consideration, July 5 the chairman of the Committee on Finance filed a cloture motion signed by fifty-two Republicans, only eight Senators of that party having refused to sign. The Democrats protested strenuously, insisting that one hour to each Senator was obviously inadequate for debate of such a measure, and that the majority were trying to shut off debate when only a third of the amendments had been considered. They predicted that the passing of ill-considered tariff legislation might do irremediable harm to industries. When the cloture motion was brought to a vote, the support fell nine below the required two-thirds majority. There had been little confidence that it could be passed, but the resort to this test doubtless caused some embarrassment to the minority and made them more ready to come to an understanding that debate on minor amendments should be speeded up. Soon thereafter the more congenial unanimous-consent agreement was secured, under which debate was brought to a close August 15, although hundreds of amendments still remained unconsidered and unexplained.<sup>1</sup>

January 22, 1926, when attempts to secure a unanimous-consent agreement for a vote upon the resolution for adherence to the World Court had been repeatedly blocked by objections, there was filed a cloture motion, signed by forty-eight Senators—three times as many as the rule prescribes.<sup>2</sup> In the two-day interval before the taking of the test vote, resort to cloture was strongly opposed, espe-

to proceed on Gronna's time. He began the delivery of a prepared address, illustrated with maps placed on the walls. But after some twenty minutes a point of order by Harrison, sustained by Sutherland who had been called to the Chair, forced La Follette to continue on his own time. He was the first Senator to exhaust his hour, and be informed by the Vice-President that he could not speak again on the Treaty. (For the Chair's ruling, see *Cong. Rec.*, 8722, Nov. 18, 1919.) At the beginning of the debate, the Vice-President, remarking that the 'rule turns the Presiding Officer into a time-keeper,' said that, if there were no objection, he should 'ask the Secretary to keep the time of each Senator as he speaks.' As there was no objection, this precedent also was established.

<sup>1</sup> Underwood called attention to the fact that this bill carried 2000 amendments, that a quorum call and a roll-call could be forced on each, and calculated that 2000 hours or 200 days could be consumed in roll-calls, if the Democrats wanted to do it. May 26, 1922.

<sup>2</sup> Page 708. Five Republicans (Borah, Brandegee, La Follette, Moses, Norris) opposed cloture. That the debate which preceded the application of cloture had by no means been wasted time is evident by the new reservations introduced almost at the last moment by Swanson, the pro-Court leader, apparently responsive to some of Borah's arguments.

cially by Southern Democrats;<sup>1</sup> but, on the other hand, it was recognized that unless cloture were applied, the tactics of the World Court opponents would delay a vote until the revenue bill must be given the right of way, and thus postpone the decision indefinitely. Even at the appointed hour when the Vice-President started to submit a cloture motion, a Mississippi Senator made a last effort to avoid recourse to that obnoxious restraint on debate by asking unanimous consent that he might offer a unanimous-consent agreement, setting a day for the vote, but this was blocked by Bruce's objection. By a vote of 68 to 26 — all but two members voting — cloture was applied.<sup>2</sup>

The Cloture Rule of 1917 has been ridiculed as futile because under its allowance of one hour to each Senator ninety-six hours, or sixteen legislative days, might still be consumed in debate. But in this second successful application of the rule, the motion for cloture was carried on the afternoon of January 25, and the final vote on the World Court resolution was taken two days thereafter. Some twenty-five Senators took part in debate under the rule, most of them speaking in favor of the resolution. Several Southern Democrats explained that, though they had voted on principle against the application of cloture, they heartily advocated adherence to the World Court.<sup>3</sup> The opponents presented reservations, most of them obviously hostile in intent. At the end of two days of debate the resolution for ad-

<sup>1</sup> Reed (Mo.) kept reminding them that only unlimited debate had saved them from the Force Bill and the Anti-Lynching Bill, and he warned them that they were preparing a noose to choke themselves to death. 'As long as I am in the Senate, if cloture is applied now, I will help to apply it at other times.' To this Robinson retorted: 'I am not terrified when the Senator threatens that, if I do what I know to be right, he will do what he knows to be wrong in other instances.' *Cong. Rec.*, 2269.

It is said that one reason for the unpopularity of the cloture rule among the Senators from the Southern states arises from an apprehension that, conceivably, if there should be a majority of Republicans in the hold-over group at the beginning of a new Congress, by a majority vote (following Smith-Vare precedents) of those present a Southern Democrat might be kept waiting on the Senate 'doormat' on the ground that his election had been invalidated by the exclusion of Negroes at the polls in the state from which he claimed election. They might then proceed to seat Republicans, still keeping the door shut to Southern Democrats. If sympathizers of these excluded claimants should seek to start a protesting debate (filibuster), Republican Senators — if they then had secured a two-thirds majority — could shut off debate and force a vote to exclude the Southern claimant. The man who can seriously forecast such a result is gifted with an exuberant imagination.

<sup>2</sup> It is doubtful if since the Senate reached its present size so large a proportion of its members had been recorded as voting upon any other measure. It was stated that Du Pont was ill; Copeland's absence was not then explained. Jan. 25, 1926, *Cong. Rec.*, 2679.

<sup>3</sup> Stephens of Mississippi and Smith of South Carolina.

herence to the World Court, modified by five reservations, was adopted by a vote of 76 to 17.<sup>1</sup>

Borah is reported to have declared: 'We should have won but for the cloture. Its [the Court's] proponents were fast weakening. They had no realization of the public sentiment against them.' Both Borah and Reed at once announced their intention to take the issue to the people. In a Chicago speech Reed declared: 'By methods as revolutionary as they were detestable, we were rushed into the Court... I appeal from the gag rule of the Senate to the ungagged judgment of the American people.' The *Record* makes it plain that there was no 'rushing.' In the pre-cloture debate the two sides of this three-year-old issue were ably presented by Walsh (Montana) and Borah. For the most part the other speeches were duplication or dilution. Reed's suggestion, that the date fixed for ending the debate be postponed a month, came at a time when one of his supporters, who had succeeded in spreading his own speech over only fifteen minutes, was acknowledging: 'I doubt very much if they [the discussions] can be materially enlarged except by tedious repetition.'<sup>2</sup>

The fourth appeal to the Cloture Rule, and its first successful application to a question of purely domestic legislation, was entirely lacking in dramatic interest. A Branch Banking Bill had been under consideration for three years. In the congestion of business in the closing weeks of the Sixty-Ninth Congress, it was being obstructed, although the great majority of both branches of Congress seemed prepared to vote. Accordingly, February 12, 1927, Pepper presented the formal notice calling for the application of cloture. It was signed by fifty-eight Senators, nearly equally divided among Republicans and Democrats — nine more than a clear majority of the membership, and forty-two more than required by the rule. It having been ruled that an intervening Sunday should not be counted in determining when the test should come, February 15 the motion was brought to a vote and agreed to by a vote of 68 yeas to 18 nays. Debate under the one-hour rule was then begun. It continued for parts of two days' sessions. Only nine Senators took part, and not more than

<sup>1</sup> Jan. 27, *Cong. Rec.*, 2494. During the pre-cloture period, debate upon the issue lagged, so that twice a decisive vote on the World Court was only staved off by Blease's clownish reading of Washington's Farewell Address with interpolations of utterly irrelevant matter, and his reading of one of his own stump speeches delivered in the previous campaign. Although Reed spoke repeatedly and at length, he was criticized for holding back parts of his speeches from the *Record*, thus depriving his opponents of a definite basis for prompt rebuttal.

<sup>2</sup> Ferris, Jan. 15 — ten days before the vote for cloture was taken!



five of them approached the time limit. Most of the debate was rambling, including much tedious quotation of earlier speeches and testimony. With thin debate under the Cloture Rule not exceeding six or seven hours — as compared with a possible maximum of ninety-six — the pending question was brought to a vote and passed by a vote of 71 to 17, thus removing the barrier to the progress of a measure to which there was no very substantial opposition, but which had been stalled for many months.<sup>1</sup>

A petition to apply the Cloture Rule to a bill creating two new bureaus in the Treasury Department, bearing twenty-six signatures, was filed February 26, 1927, and two days later was agreed to by a vote of 55 to 27. After but two days of debate, the bill was passed by a vote of 71 to 6.<sup>2</sup> During the next seven years, although many requests for the limitation of debate by unanimous-consent agreements were sought and granted, not one bill or resolution was carried forward to its decisive vote under Cloture Rule. In that period three petitions for its application were filed, but two of them became of no effect because, in the two-day interval before the cloture resolutions were to be voted upon, the Senate had already taken decisive action upon the matter in question.<sup>3</sup> January 17, 1933, a petition signed by twenty-nine Senators was filed for the application of cloture to the pending banking bill. During the next two days repeated efforts were made to secure a unanimous-consent agreement on the basis of which the cloture petition might be withdrawn, but without success. The vote of 58 to 30 failed to give the requisite two-thirds majority; but forthwith a new proposal for a unanimous-consent agreement was approved. Debate continued under the limitation that no Senator should speak longer than an hour upon the bill nor thirty minutes upon any amendment, and at the end of a week this long-delayed bill was passed.<sup>4</sup>

### *Filibusters Not Ended by the Cloture Rule*

Three typical experiences soon made it clear that there are some situations to which the new Cloture Rule cannot be applied, and

<sup>1</sup> Feb. 15 and 16, 1927, *Cong. Rec.*, 3817; 3957.

<sup>2</sup> The debate was mostly not upon the merits of the bill, but in criticism of the cloture procedure. See *ibid.*, 4903; 4975; 4981; 5009-16, and 5167.

<sup>3</sup> These were the petition of March 1, 1929, relating to the continuing of the powers of the Radio Commission; and the petition relating to the repeal of the 18th Amendment, filed Feb. 14, 1933.

<sup>4</sup> Jan. 26, 1933. Yeas, 54; nays, 9. *Ibid.*, 2517.

others in which a two-thirds vote can never be obtained to invoke cloture.

From two o'clock until half after eleven on the morning of March 4, 1919, three Senators, by talking in turn, held the floor and thus prevented bringing to a vote appropriation bills aggregating about \$4,000,000,000, and other measures of great importance.<sup>1</sup> Sherman declared that he would defeat these bills 'unless I drop down dead.' This performance was fiercely denounced by the Democratic press as a traitorous conspiracy, a defiance of the will of Congress and of the American people. The Republican press was more complaisant, mildly criticizing the three Senators' action in breaking over the restraints imposed by the Republican leaders. For the expiring Congress was Democratic, whereas the Republicans were to control both branches in its successor. Patience over the delay was also induced by the consciousness that many of the stupendous legislative measures which were talked to death had been so hastily and crudely framed that to pass them with but a few minutes' consideration, when even committee chairmen were not confident as to their real significance, would be grotesquely unwise.

During the third session of the Sixty-Seventh Congress, November 20 to December 4, 1922, there developed over the Dyer Anti-Lynching Bill so effective a filibuster that from the moment when a motion was made that the Senate proceed to the consideration of that bill no legislative business whatever was allowed to be transacted until that measure was formally abandoned on the last day of the session. Not only was this filibuster unprecedented for its effectiveness but for the frankness with which its object was avowed, and for the novel methods which it employed.

The Chair, having ruled that the motion to take up the Anti-Lynching Bill was debatable, the first Senator to secure recognition began: 'Mr. President, understanding that the motion is debatable, I wish to make some remarks upon the criticism that has been directed toward . . . M. Clemenceau.'<sup>2</sup> And Clemenceau and French policy remained the themes of discussion for the rest of that day, every motion to take up even uncontested bills being blocked by objection.

<sup>1</sup> La Follette, France, and Sherman — all members of 'little group of wilful men' whom President Wilson had excoriated for their hold-up of the bill for arming merchant vessels in the closing hours of the preceding Congress.

It was at the end of this tumultuous session that Vice-President Marshall was alleged to have made announcement that the 65th Congress was 'adjourned *sine Deo*.' Editorial in *Worcester Evening Post*.

<sup>2</sup> Nov. 27, 1922, *Cong. Rec.*, 288.

The purpose of the obstructionists and the strength of their position appeared in the following colloquy:

Underwood: It is perfectly apparent that you are not going to get an agreement to vote on this bill. . . . I want to say right now to the Senate that if the majority party insist on this procedure, they are not going to pass the bill and they are not going to do any other business. . . . We are going to transact no other business until we have an understanding about this bill. . . . We are willing to take the responsibility, and we are going to do it.

Nelson: They ought to be content with defeating this bill, but the remarks of the Senator indicate that unless we withdraw this bill, they will defeat everything and allow nothing to come up.

Underwood: To be sure; undoubtedly.

Nelson: That is a threat unworthy of the Senator from Alabama.

Underwood: This is not the first time that I have ever engaged in a filibuster. I do not often do it, and I do not ever intend to do it without adequate justification. . . . This proposal is fundamental. We regard this bill as a rape of the Constitution. . . . If we agree that we are merely going to fight the Dyer bill, and let the majority lay it aside and transact such business as they want to transact, they will have it as a bumper against anything we may want to do.<sup>1</sup>

Throughout the struggle the obstructionists relied not upon speeches against the bill but upon new expedients — the refusal of unanimous consent to dispense with the reading of the *Journal*, the actual reading of the *Journal*, and motions to amend or correct its record. For example, in the midst of the reading of the *Journal*, Harrison suggested the absence of a quorum. The Chair sustained a point of order that there had been no business transacted since the last roll-call, but Harrison, insisting that business had been transacted, namely the reading a portion of the *Journal*, appealed from the ruling, and asked for the yeas and nays. Of course the Chair was sustained, by a vote of 60 to 1 — Harrison voting with the majority! But half an hour had been consumed.<sup>2</sup> On the day following Underwood's bold avowal of the intent to block all legislative

<sup>1</sup> *Cong. Rec.*, 390.

<sup>2</sup> On another occasion it was noted that the Chaplain's prayer had been omitted, and an amendment to incorporate the text of the prayer in the *Journal* served as a peg on which to hang debate lasting nearly two hours. Other fantastic proposals were: to insert the names of places from which petitions mentioned in the *Journal* had been sent; to correct the *Journal's* statement that the Secretary had read the *Journal*, whereas the reading had been by the Assistant Secretary; to state the precise time at which the Vice-President resumed the Chair. In the closing days of a regular session the exploitation of the *Journal* for filibustering purposes would probably be prevented by the substitution of a recess for an adjournment, so that a legislative day might be continued for many days, thus obviating the necessity of reading the *Journal* for every calendar day's session.



business, Curtis, the Republican whip, citing Speaker Reed's celebrated ruling that where a rule does not cover a situation the general parliamentary rules apply, tried to get from the Chair a ruling, like Reed's, declining to entertain 'dilatatory motions,' but Vice-President Coolidge would take no such bold stand.<sup>1</sup> Not until the last day of the session, after the majority leader, as instructed by the Republican conference, had given notice that the majority would not press the Anti-Lynching Bill further either in that special session or in the coming regular session, did Underwood announce that upon that assurance he did 'not desire to make any further motion that will interfere with business.'<sup>2</sup>

In the closing session of the same Congress a very different filibuster was fought to a finish in short order. As in 1915, the issue was a Shipping Bill, but the party tables were turned. Passed by the House by the narrow majority of twenty-four, with sixty-seven Republicans voting against it, this 'Administration' bill came to the Senate with dubious prospects, since it was forecast that seven Republicans were opposed to it and three others were 'doubtful.' Attempts proved unavailing to get an agreement upon a date for the final vote, so as to dispose of the bill before the congested closing days of the Congress. When it was finally made the Senate's unfinished business, a filibuster under the management of the 'Farm bloc' speedily developed, using the time-worn method of long-winded speeches. One of their spokesmen declared on the floor of the Senate that it was the intention of the opponents of the bill to kill it by any legitimate means, and that he considered filibustering legitimate. Sheppard was warmly congratulated by La Follette for his achievement in starting this fight against a 'ship-subsidy' measure by an eleven-hour speech on the League of Nations; Reed devoted four hours to a discussion of the

<sup>1</sup> Nov. 29, 1922. Senator Curtis discussed this episode with the writer.

<sup>2</sup> He added that if the Dyer Bill were resumed, the fight would be resumed, and that the obstructionists had no apologies to offer. (Dec. 4, 1922.) The Senate met at 10 A.M., that day, and after the above colloquy and the approval of the *Journal* of the preceding four days, adjourned *sine die*. The regular session opened at noon of the same day. In the House the Dyer Bill had encountered determined opposition, but its record there proved that obstruction 'can only be successful where cloture is impossible.' Debated there under a special rule which allowed only sixteen hours for its consideration, it was brought to a vote and passed, January 26, 1921, 231 yeas to 119 nays. In the House representation in proportion to population gave this two to one decision in favor of the bill. But in the Senate equal representation of the States made it certain that a two-thirds vote for cloture could not be secured, and doubts not only as to the policy but as to the constitutionality of the bill from the beginning made its passage by the Senate highly improbable. Lindsay Rogers, *American Political Science Review* (Feb., 1924), 94 ff.

purchase of the Danish West Indies; Borah, two hours to the recognition of Soviet Russia; McKellar spoke for more than five hours on the dismissal of certain government employees, and announced that he was prepared to read entire Smoot's classic eleven-hour speech in the Republican filibuster against the Democratic shipping bill of 1915. Brookhart enumerated the speakers who were still scheduled to speak and their motley topics. After a week of such time-killing, Jones, in charge of the bill, surrendered, and asked that the bill be set aside as unfinished business.

To Long of Louisiana belongs the discredit of the longest exhibition of low-class vaudeville ever perpetrated in the Senate Chamber. June 13, 1935, he took the floor 'to save to the sovereign states their rights and prerogatives' and 'to preserve the right and prerogative of the Senate as to the qualifications of important officers.' The Administration was not consulting Long as to patronage in Louisiana, but he had no success in enlisting his colleagues in defense of senatorial or state prerogative. For nearly sixteen hours he maundered on. Of all that time not a half-hour was devoted to a sincere discussion of the Executive's alleged offense in placing in high-salaried positions men whose names had not been submitted to the Senate for confirmation. At least fifteen hours were given to sheer time-killing drivel. Nothing was too irrelevant to serve his purpose. He gave recipes for fried oysters and 'pot-likker,' for coffee and turnip greens. Cards from the press gallery brought welcome suggestions: the life of Judah P. Benjamin, the history of Frederick the Great. For hours he expounded the Constitution, section by section; he asked unanimous consent to have the Democratic platform read by the Clerk, and that the Clerk be allowed to read into the *Record* the Lord's Prayer! Objections blocked such requests. Apparently there was but one roll-call to determine the presence of a quorum, although the speaker himself from time to time jokingly called attention to the facts that but fourteen, or twenty-two, or thirty members were present. After he had been talking for about twelve hours, at the request of Schwollenbach (Washington) he 'yielded for a question,' which took the form: 'Does the Senator from Louisiana realize' that a group of new Senators who 'day after day and week after week and month after month have seen the Senate, which is supposed to be the greatest deliberative body in the world, turned into a circus by the Senator from Louisiana, are going to sit in the Senate tonight and tomorrow and all this week and from now on

until something is done to stop the Senator from Louisiana from controlling the Senate?' Long continued for nearly four hours longer to hold the floor, but it was clear that Schwellenbach was the spokesman of a determined group of young revolvers with whom the great majority of the Senate heartily sympathized, and that there would be no unanimous-consent agreement of any kind until Long should yield the floor. The farce ended at early dawn. It had lasted nearly sixteen hours. In the *Congressional Record* it fills about eighty-five pages — printed at an expense of thousands of dollars!<sup>1</sup> From beginning to end it was literally if not legally 'in contempt of the Senate,' tending inevitably to bring it into disrepute at home and abroad. Yet Long in his clowning simply took advantage of Senate rules which enabled him to inflict on that body this long-drawn-out folly — an indignity which would not have been tolerated in any other legislative chamber in the world.

August 26, 1935, after a brief recess the Senate reassembled at 6.12 P.M. At the request of the Senate the House had returned the Supplemental Deficiency Bill, and the majority leader declared that it was clear to him that the only way in which that bill could be passed was by the elimination of the two amendments relating to cotton and wheat. As a step toward that action, he moved that the Senate reconsider the votes by which that bill had been passed, and asked that by unanimous consent debate upon this motion be limited to five minutes by each Senator. Long objected. Robinson then asked the Chair to lay before the Senate a House concurrent resolution providing that the two Houses adjourn August 26, 1935, and that 'when they adjourn on said day, they stand adjourned *sine die*.' Norris warned that this proposed action 'would make it possible for someone to talk until twelve o'clock, and then the bill would be dead,' but the concurrent resolution was put to vote and agreed to. When the motion to reconsider the Deficiency Bill was made, Long at once took the floor. He professed to be speaking to prevent 'the cutting the throats of the wheat farmers' without a vote by the House. Apparently no other Senator approved of the procedure which he advocated nor took seriously his oft-repeated claim that 'his stand for principle . . . may preserve legislative government, which is nearly gone.'

Resisting every appeal from many Senators that he yield the floor

<sup>1</sup> Probably not less than \$3800, according to estimate in letter from the Public Printer to the writer, Sept. 24, 1935.



in order to afford some chance for the enactment of this bill providing the needed funds for old-age pensions, for the relief of the blind, for needy and crippled children, he held the floor for nearly five hours and a half.

The clock above the Vice-President's chair showed that midnight was at hand. Then:

Mr. Schwellenbach: Mr. President, a parliamentary inquiry.

The Vice-President: The Senator will state it.

Mr. Schwellenbach: It is now almost twelve o'clock. I submit as a parliamentary inquiry to the Chair, whether or not, because of his selfish desire to get publicity for himself, the Senator from Louisiana has not defeated the hopes and aspirations and the desires of the people of this country?

The Vice-President: The hour of twelve o'clock having arrived — the Senate stands adjourned *sine die*.

Huey Long had won his last filibuster!<sup>1</sup> In less than a fortnight he met death by an assassin's bullet, as he strode from the legislative chamber in the Capitol of his own state.

## 'REFORM' OF THE SENATE RULES AS TO DEBATE

No other Vice-President upon the occasion of his own inauguration has ever created such a sensation as did Charles G. Dawes. Hardly had he taken the oath of office in the presence of the President, the Supreme Court, the Diplomatic Corps, members of the Senate and House, and a most distinguished audience that thronged the galleries, than with strident voice and violent gestures he entered upon a

<sup>1</sup> In the last half-hour of this filibuster, Long spoke in this tone:

I have made a fortune in my lifetime and it has gone to humanity. I not only made a fortune but I sacrificed another fortune in order that I might fight for humanity. . . . I have nearly made another fortune since that time and spent it for humanity, and I will make one this year and I will spend that for humanity, for the God-living blood and marrow of humanity. . . . The people of my section of the country know that I am here fighting for humanity, and you cannot bring me a bill in here and say to me 'cut the wheat farmers out of it and the cotton farmers out of it, before it can go out of here.' . . .

I challenge Senators to find out anything I have ever stood for in this body that has not been popular among the people . . .

Go down [to Louisiana] and help beat me. I come before the electorate in Louisiana in four months, and I challenge the whole dad-gunned kit and barrel of the Democratic Party to come down and beat me. I want them to beat me if they can on this issue.

scathing denunciation of the Senate Rules, and an exhortation for their thoroughgoing 'reform,' as 'demanded not only by American public opinion, but I venture to say in the individual consciences of the members of the Senate itself.' What he most strongly condemned was that feature of the rules, which, as developed under 'senatorial courtesy,' made it possible during the last few days of a session for the minority or even for a single Senator to kill legislation providing the revenue to pay the expenses of the Government, or to force the President of the United States to call a special session of Congress. 'Who would dare maintain that in the last analysis the right to the Senate to act should ever be subordinated to the right of one Senator to make a speech?'

Not content with launching this attack, Vice-President Dawes soon declared his intention to carry his reform campaign to the country, and the surprising spectacle was witnessed of the President of the Senate, imposed upon that body by the Constitution, continuing, wherever and whenever opportunity offered, his violent denunciation of the Senate rules. An early evidence of the belief that this issue might 'have votes in it' was seen in a California Representative's forthwith announcing his candidacy for the Senate 'on a platform of reform of Senate rules.' The most formal and outspoken opposition to the Dawes program of reform came from an unexpected quarter. At its national convention the American Federation of Labor condemned unanimously the Vice-President's 'campaign to abolish free speech in the United States Senate' and urged that every publicity be given to 'the denunciation by Labor of the Dawes scheme which does not come from the people but emanates from the secret chambers of the predatory interests.' Their statement continued:

For several months the Vice-President of the United States has conducted an agitation for the purpose of abolishing free speech in the United States Senate, the only forum in the world where cloture does not exist and where members can prevent the passage of reactionary legislation. . . .

The railroad industry, the great oil industry, and other great industries in the United States, want to make it possible for a handful of men in the United States Senate to control all legislation. It is a vicious idea, a vicious purpose to which the Vice-President of the United States has loaned himself.<sup>1</sup>

The Vice-President's intent was fulfilled. He made the Senate Rules as to Debate the chief topic of the day, and called forth a

<sup>1</sup> American Federation of Labor Information and Publicity Service, Oct. 17, 1925.

prodigious amount of press comment and popular discussion. The impulse of the people — whose patience during the preceding eighteen months had been sorely tried by the ridiculous and discreditable features of two uproarious filibusters — was to side with the Vice-President in his strictures. But men of longer memories could but contrast the sweeping condemnation erupting from a Vice-President, who at the moment was facing the Senate for the first time, with the far more tolerant judgment which had been expressed by Vice-President Stevenson, as he left the office after four years of service as the Senate's presiding officer:

It must not be forgotten that the rules governing this body are founded deep in human experience; that they are the result of centuries of tireless effort in legislative halls to conserve, to render stable and secure the rights and liberties which have been achieved by conflict. By its rules the Senate wisely fixes the limits of its own powers. Of those who clamor against the Senate, and its methods of procedure, it may truly be said: 'They know not what they do.' In this Chamber alone are preserved, without restraint, two essentials of wise legislation and of good government — the right of amendment and of debate. Great evils often result from hasty legislation; rarely from the delay which follows full discussion and deliberation. In my humble judgment, the historic Senate — preserving the unrestricted right of amendment and of debate, maintaining intact the time-honored parliamentary methods and amenities which unfailingly secure action after deliberation — possesses in our scheme of government a value which cannot be measured by words.<sup>1</sup>

In the weeks which followed Vice-President Dawes's explosion, one significant fact was the frequent avowal of a belief that the Senate rules had at any rate manifested the 'qualities of their defects' — that the filibuster had killed more bad bills than good ones. Said the Senate minority leader:

In no single instance has a measure of outstanding importance, defeated through resort to filibuster, been subsequently revived. In every case where a considerable minority has resorted to the utmost extremity to prevent a vote upon a bill, it has been based on the contention that the proposal is inconsistent with the spirit of American institutions, is violative of the fundamental principles of our government, and, if thoroughly understood, will be rejected as subversive of American civilization. The Force Bill (1891) and the Dyer Anti-Lynching Bill (1922) are illustrations. If a vote had been taken in the Senate upon either, they would have been passed by large majorities. Yet neither has ever been brought forward again.<sup>2</sup>

<sup>1</sup> March 3, 1897, *Cong. Rec.*, 2932.

<sup>2</sup> J. T. Robinson, *The United States Senate at Work* — an address before the Goodwyn Institute, Memphis, Tenn., Nov. 11, 1925. G. H. Moses declared: 'Our rules . . .



Senatorial opinion was by no means persuaded that the rules were indefensible and in desperate need of 'reform.' In the judgment of one of its best informed members, eighty out of the ninety-six Senators were opposed to cloture by mere majority vote.<sup>1</sup> Underwood, who had been commander-in-chief of the dramatic filibuster against the Anti-Lynching Bill the previous year, promptly introduced a resolution for a previous-question rule similar to that of the House. Charged with inconsistency, he replied that as long as the rules permitted filibustering, he considered it permissible to play the game.<sup>2</sup> The agility with which some of the most eminent Senators have from time to time shifted their attitude toward the filibuster emphasized the appropriateness of the definitions: 'A filibuster is either a reprehensible artifice of a sinister opposition, or an ingenious and patriotic device of our friends for saving the people';<sup>3</sup> or, 'A filibuster is an abomination unto the Lord, and a very present help in trouble.' The Underwood resolution, modified so as to apply limitation of debate by majority vote only to appropriation and revenue bills, was the subject of spirited debate, a year later. It was earnestly advocated by its author, but opposed by four other Senators. Robinson declared that such a rule would permit a mere majority of Senators present at the end of a calendar day to force a vote on any appropriation or revenue measure through all amendments to its final passage — a monstrous proposition in the case of a tariff bill with thousands of amendments. Turning to Vice-President Dawes, he said: 'To you, Sir, who sit in the Chair,

have never kept any desirable or desired legislation off the statute books. A lot of bad legislation has been kept off the statute books by them.' Press report, April 28, 1925.

<sup>1</sup> J. T. Robinson. The *New York Times*, May 31, 1925, summarized the replies to a questionnaire sent to all members of the Senate, reporting that 6 Senators approved the Vice-President's stand; 22, though non-committal, were believed to be sympathetic; 45 opposed, and 6 others were believed to be against him; 17 gave no indication.

<sup>2</sup> W. J. Stone, on the floor of the Senate, bitterly denounced Vice-President Marshall for not having checked another Senator's irrelevant filibustering. He regained his good humor when the genial Vice-President in private conversation reminded him of his own performance, a few months earlier, in filibustering for hours by reading from *Paradise Lost*.

<sup>3</sup> Edward E. Whiting, in *Boston Herald*, Dec. 17, 1924. Eminent Senators have filibustered frankly with neither evasion nor apology. Thus, Underwood and his aids made their fight against the Anti-Lynching Bill as a 'rape of the Constitution.' Smoot began his eleven-hour speech: 'Mr. President, as a servant of the American people, I feel it my duty to do everything in my power to defeat the pending bill. It is undemocratic, unrepugnant, un-American in its provisions, and will be dangerous and mischievous, if it ever becomes a law.' (Jan. 29, 1915.) Later, when taunted with having filibustered, he declared that by so doing they had saved \$50,000,000 and prevented the enactment of an un-American bill. 'I want to congratulate every Senator who took part and the American people are to be congratulated upon the success of the undertaking.' Feb. 19, 1915, *Cong. Rec.*, 4094.

with your broad business experience, I say that nothing worse could come to the people of the United States than the bringing about of the thing which this resolution would impose.' <sup>1</sup>

That the Senate will so amend its rules as to permit cloture upon the vote of a mere majority of those present, as in the House, is to the last degree improbable. Reluctance to make such a change is mainly due to a sincere conviction on the part of Senators (and of many outside the Senate who have studied most closely the working of our system of government) that cloture thus applied would 'destroy the deliberative function of the Senate, annihilating the very reason for its existence, and making it automatically a mere annex of the House of Representatives.' <sup>2</sup> It was the intent of the framers of the Constitution to secure from the Senate a different point of view, a more matured judgment than that of the House. To those ends the longer term, the more advanced age, the smaller numbers, the equal representation were all expected to conduce. What is sorely needed in Congress is seldom greater speed but always more thorough consideration in law-making. Cloture by a vote of a chance majority in the Senate would have brought many a decision which would have accorded ill with the sober second thought of the American people: it would probably have given us the Force Bill in 1891; free silver in 1893; prompt admittance of Lorimer in 1909; <sup>3</sup> the Ship-Purchase Act in 1915; the ratification of the Versailles Treaty in 1919; the Anti-Lynching Bill in 1922; the Ship-Subsidy Bill in 1923; the World Court Adherence without reservations in 1926. Opinions differ widely as to the merits of these measures, but who will now deny that in many of these instances the snap-shot decision would have been calamitous? In these days of weakened party discipline, the temporary majority that group combinations may today give upon a pending measure may by no means indicate a responsible majority's conviction that the measure is wise. Nor is it safe to assume that in blocking a given piece of legislation a small minority or even a single Senator is 'thwarting the will of the majority of the Senate.' <sup>4</sup>

<sup>1</sup> June 4, 1926, *Cong. Rec.*, 10704.

<sup>2</sup> A. J. Beveridge, address before the National Education Association, June 30, 1926.

<sup>3</sup> Beveridge declared that Lorimer was admitted on the last day of the session because of the sheer exhaustion of the opposing Senators; but because that resolute fight had aroused the nation, at the next session he was ousted. *Boston Herald*, May 24, 1925.

<sup>4</sup> Note the case of Carter, single-handed, preventing a vote upon a river and harbor bill, carrying appropriations of many millions of dollars, to the keen satisfaction of Senators, Representatives, and President — all of his own party (p. 400).

## LIMITATION OF DEBATE WITHOUT CLOTURE BY MAJORITY VOTE

Not a few Senators frankly recognize that the present rules easily lend themselves to practices which have often been injurious to legislation and have greatly discredited the Senate in the opinion of the public. There are hopeful signs of co-operation to remedy these evils.

*Through Amendment of the Constitution*

The abuse that has most often exasperated the public — the one that Vice-President Dawes most emphasized — is the hold-up of needed appropriations by one Senator of steady legs and good lung-power until he extorts the favor that he demands. A typical illustration is Tillman's securing an appropriation of nearly fifty thousand dollars for his State by taking the floor with a copy of *Childe Harold* and serving notice that he would read from Byron until the end of the session, unless that claim was put back into the pending appropriation bill.<sup>1</sup> The blocking of \$4,000,000,000 in appropriations and other important legislation by the team-play of three men in 1919 called forth a storm of indignation.<sup>2</sup> But in the great majority of cases the congestion that made possible such raids and hold-ups occurred in the final days of the 'short session,' which had to come to its end at noon on the fourth of March. The history of filibusters shows that in other sessions, where there was no such rigid time limit as to adjournment, when a majority in the Senate got ready to vote, it could usually secure a vote in a reasonable time. The filibuster soon talked itself out. The obvious remedy, therefore, was a change of congressional schedules so that each year the session would begin in January and end when its work was done. This change has been effected by the Twentieth Amendment, along with other changes of even more signal importance. This amendment was proposed by a Senator and by almost unanimous votes had been thrice approved by the Senate.<sup>3</sup> The blame for delay in applying the obvious and effective remedy for these end-of-the-session filibusters must rest not with the Senate but with the House, where during three Congresses this amendment had not been allowed to come to a vote.

<sup>1</sup> Page 463.

<sup>2</sup> Page 410.

<sup>3</sup> Introduced by Senator George W. Norris. Proclaimed a part of the Constitution, Feb. 6, 1933. Ex-Senator Moses declared: 'It makes a filibuster in the Senate a futility — unless it should arise after a definite date has been agreed upon for the adjournment of Congress.' (July 12, 1935.) It was in precisely that contingency — as Norris, himself, warned — that Huey Long seized the opportunity to start his last filibuster, August 26, 1935 (p. 414).



*Through Enforcement of the Present Rules*

'The Vice-President has the lesson of his life coming to him. . . . The rules of the Senate are hopeless; improvement will have to be deferred to the next world.'<sup>1</sup> But it may be that a resolute and tactful Vice-President's evoking non-partisan support in enforcing the rules as they now stand and in reversing questionable precedents would result in such improvement in Senate practice that radical amendment of the rules would prove unnecessary.

*Recognition*

A Senator who desires to speak must 'address the presiding officer and shall not proceed until he is recognized.' Some Presiding Officers have been responsible for great waste of time by not insisting upon this orderly procedure. There is no appeal from the decision of the Chair as to recognition, and so weighty an authority on constitutional law as Judge Cooley has seemed to approve the according of recognition — as between simultaneous claimants — in such wise as to obtain for the Senate 'the inalienable right to express its will.'<sup>2</sup>

*Limitation of the Number of Times a Senator May Speak*

Ever since 1789 it has been the rule that 'No Senator shall speak more than twice upon any one question in debate on the same day without leave of the Senate.'<sup>3</sup> Laxity in the enforcement of this rule was early noted.<sup>4</sup> In recent years its disregard is said to have been so frequent that a rigorous enforcement of the limitation would save much time and lessen diffuseness in debate.

*Posture*

The Rules prescribe that the member who desires to speak 'shall rise.' Jefferson's *Manual*, citing English precedents, says: 'He is to stand up in his place. . . . But members who are indisposed may be indulged to speak sitting.'<sup>5</sup> When obstruction takes the form of long-distance speech-making, the Chair's ruling as to what posture is permissible may have considerable importance. During Smoot's

<sup>1</sup> W. N. Ferris, quoted in letter to *Boston Herald*, March 9, 1925.

<sup>2</sup> Rule XIX, cl. 1. Note Vice-President Marshall's admonition, Gilfry, *Senate Precedents*, II, 134.

<sup>3</sup> The majority leader, by securing recess instead of adjournment from day to day may prolong the 'same [legislative] day' indefinitely, thus cutting down to two the number of speeches that a Senator may make. Holding night sessions is also a method of discouraging filibustering.

<sup>4</sup> J. Q. Adams, *Memoirs*, I, 323, Dec. 21, 1803.

<sup>5</sup> Sec. XVII.

speech of more than eleven hours, Stone raised the point of order that 'under the rules a Senator cannot address the Senate sitting unless he is sick.' Smoot declared that he was not sitting, but that he well remembered an occasion when Stone, engaged in a filibuster, 'sat not simply upon the arm of his seat, resting upon it, but in his seat for hours at a time, and no one ever questioned his doing so.' Stone professed that he did not remember such an occurrence, adding, 'The Senate never would have permitted it.' The presiding officer ruled: 'The point of order is well taken. The Senator from Utah will either take his feet or take his seat.'<sup>1</sup> When Copeland was staging his filibuster against the Isle of Pines Treaty, to prevent his resting the Senate was held in session without recess from noon until late in the evening. He held the floor continuously for eight hours, occasionally resting upon the arm of his chair.<sup>2</sup> Late in the session a strict parliamentarian assumed the Chair, and presently admonished the speaker that 'he must proceed in order' — that 'no Senator can speak from a seat; he must stand on his feet.'<sup>3</sup> A little later, when Copeland sought relief by pacing the aisle, the same presiding officer warned him: 'If the Chair were to enforce the rule strictly, he would require the Senator from New York to remain at his desk.' Although he added that he had not yet 'decided upon the enforcement of that rule,' the suggestion evidently carried weight, for Copeland's rambling speech soon came to an end.<sup>4</sup>

### *Dilatory Motions*

The Cloture Rule of 1917 explicitly states that after a two-thirds vote has imposed limitation upon debate, 'no dilatory motion, or dilatory amendment, or amendment not germane shall be in order.' Under this provision, when after a third roll-call during the World Court debate Reed moved to adjourn, the point of order that the motion was dilatory was held by Vice-President Dawes to be well taken, and Reed's appeal from that ruling was tabled by a vote of more than five to one.<sup>5</sup> A most valuable precedent, now supported by too great Senate majorities to be disregarded, is that which holds it to be out of order to raise the question of the presence of a quorum unless

<sup>1</sup> Jan. 29, 1915. *Cong. Rec.*, 2594.

<sup>2</sup> March 12, 1925.

<sup>3</sup> Fess, *Cong. Rec.*, 174-75.

<sup>4</sup> While these admonitions were being given from the Chair by Fess, Vice-President Dawes was in the Chamber, and Copeland jokingly called his attention to the manner in which Senate Rules were administered by presiding officers from the Senate's own membership. Copeland had also been warned that he could not 'yield,' even for an inquiry, without danger of losing the floor. For similar ruling, see p. 385.

<sup>5</sup> Jan. 25, 1926.

'business' other than continued speech-making has intervened since a quorum was last disclosed.<sup>1</sup>

Even in the absence of a general rule in the Senate against dilatory motions, it may be queried whether in the office of President of the Senate a Charles G. Dawes, as contrasted with a Calvin Coolidge, would hesitate, on points of order raised from the floor, to make drastic rulings against dilatory motions,<sup>2</sup> adopting Reed's contention that 'processes of the House [Senate] intended for the transaction of business should not be used to prevent business.'

### *Relevancy*

In the summer of 1848 Vice-President Dallas sustained the point of order that the topics introduced by the Senator who then held the floor were irrelevant to the subject matter of the resolution, and that he was out of order.<sup>3</sup> A few weeks later another Senator was called to order for irrelevancy. The Senator then in the Chair decided that the speaker was not out of order, but on appeal the decision was reversed by an almost unanimous vote.<sup>4</sup> Two days later, however, President *pro tempore* Atchison ruled that a Senator, whom Webster had called to order for irrelevancy, was in order.<sup>5</sup> February 29, 1872, Vice-President Colfax fairly invited a decision from the Senate, and its verdict by a vote of 28 to 18 was to the effect that a Senator cannot be called to order for irrelevancy in debate.<sup>6</sup> That precedent has since been held binding, despite the fact that Jefferson's *Manual*, for which the Senate ordinarily professes great deference, prescribes: 'No one is to speak impertinently or beside the question, superfluously, or tediously'!

Majority Leader Robinson held that by reversing this unfortunate precedent the presiding officer has the power to confine discussion in the Senate to the subject matter, and thus curb if not destroy the practice of filibustering.

<sup>1</sup> Page 401.                      <sup>2</sup> Page 412. Reed's *Parliamentary Rules* (1894), 215.

<sup>3</sup> July 5, *Cong. Globe*, 898. No appeal was taken; but Clayton, by a vote of 26 to 22, was allowed to proceed.

<sup>4</sup> Gilfry, *Senate Precedents*, I, 401. Aug. 12, 1848.

<sup>5</sup> Aug. 14, 1848, *Cong. Globe*, 1083-84.

<sup>6</sup> *Cong. Globe*, 1293-94. For more than fifty years no point of order against irrelevancy has been sustained. Vice-President Marshall declared: 'The Chair, early in the experience of the present incumbent, was very desirous of ruling that Senators should talk upon the matter that was before the Senate, but learned that the history of the Senate from the beginning was that a Senator could talk about anything, whether it was applicable to the matter before the Senate or not.' April 7, 1914, *Cong. Rec.*, 6102; 6104; also, 6329.



If Vice-President Dawes, in a case where a Senator is abusing the privilege of debate by insisting upon speaking to irrelevant questions, will hold the Senator out of order, he will be able to force a vote upon the correctness of his ruling, and, if a majority of the Senate sustain him, the Senator can only proceed upon motion and with consent of the Senate. So that extreme cases of filibustering may be met through the exercise of intelligence and courage on the part of the Chair, if supported by a majority of the Senate. . . . Some of us, including myself, would like to see the absurd precedent, that a Senator is himself a judge of whether he is speaking to the subject, overruled.<sup>1</sup>

In the House it is required that a member 'shall confine himself to the question under debate,' and generally quite strict compliance with this rule has been insisted upon.<sup>2</sup> In other legislative bodies the presiding officer determines the question of relevancy; but in the Senate that decision is left to the speech-making Senator's own conscience.

Under this fantastic straining of senatorial courtesy, irrelevancy has been carried to preposterous lengths. Filibustering speeches are padded with utterly extraneous matter.<sup>3</sup> When no filibuster is in progress, Senators who secure the floor often improve the opportunity to exploit their pet hobbies at portentous length to a nearly empty Chamber. Some Senators, trifling with their own self-respect, make a joke of their own irrelevancy<sup>4</sup> and fill their speeches with drivel that discredits them with the public. In a speech in Chicago, soon after the Senate, having applied cloture, had given its approval to the resolution for our adherence to the World Court, Reed (Missouri) shouted: 'I appeal from the gag rule of the Senate to the ungagged judgment of the American people. Sixty-eight members of the Senate may close their ears to argument and reason, . . . etc.'<sup>5</sup> But those sixty-eight Senators did not decide to 'close their ears' until they found that Reed and his filibustering aides could supply 'argument and reason' of no higher quality or pertinence than Blease's reading a stump speech

<sup>1</sup> J. T. Robinson, *The United States Senate at Work* (Nov. 11, 1925).

<sup>2</sup> Rule XIV, cl. 1. House practice as to relevancy is discussed in the *House Manual* (1923), secs. 735-36, and in Hinds's *House Precedents*, V, secs. 5043-48; 5056-63.

<sup>3</sup> Pages 412-13.

<sup>4</sup> Moses, Sept. 14, 1922, began a speech: 'Mr. President, the Liberian Loan being under consideration, I wish to offer a few observations on paragraph 526 of the Tariff Bill.' *Cong. Rec.*, 12569.

Irrelevancy in Senate debate is nothing new. Jan. 26, 1830, Webster in his 'Reply to Hayne,' who had ostensibly been discussing Foote's resolution looking to the restriction of land sales, declared: 'To that subject in all his excursions, he has not paid even the cold respect of a passing glance.'

<sup>5</sup> Quoted in *Literary Digest*, March 13, 1926.

which he had delivered in his campaign for nomination the previous year, and Reed's sending to the desk a thirty-three-year-old article by Andrew Carnegie, the Clerk's reading of which killed an hour and a half of the Senate's time. To the deplorable lessening of popular respect for the Senate few things have contributed more directly and largely than such clownish and insincere attempts to prevent action upon which the great majority of the Senators, after long consideration, are deliberately resolved.

*Through Amendment of the Senate Rules*

Proposals to curb irrelevancy by amendment of the rules are not new. In 1914 Smith (Georgia) proposed to add to Rule XIX the following requirement:

When a measure is pending before the Senate, debate shall be limited to the discussion of the pending measure. A Senator, called to order on the ground that he is violating this rule, shall not be permitted to proceed further unless he states that in good faith he is endeavoring to discuss the measure before the Senate.<sup>1</sup>

This would allow no other appeal than to the Senator's own conscience which might prove highly elastic. In 1925 both Fess and Jones (Washington) introduced resolutions for the amendment of Rule XIX so as to require that a Senator speak to the issue before the Senate, but giving any member the right to call the Senator to order for irrelevancy, subject to an appeal from the Chair's ruling, to be decided without debate. Some of the most influential members of the Senate, from both parties, have indicated that they would support such an amendment.

Another change which a leading Senator has advocated would be an amendment requiring that no documents or papers shall be read in debate. This is aimed at an abuse of the privilege of debate almost as serious as that of entire irrelevancy. At the beginning of his endurance test, many a filibuster provides himself with a barricade of reports and volumes of the *Congressional Record*, with the sole intent that by the reading of long excerpts he may lengthen indefinitely his control of the floor. This practice — not the reading of brief and pertinent passages — is what the suggested amendment aims to curb.

Speaker Reed is said to have 'thanked God that the House had ceased to be a deliberative body' — a transformation the doubtful

<sup>1</sup> April 4, 1914.

credit for which he might have taken largely to himself. The very fact that legislation can be gaveled through the House at breakneck speed with but the scantiest of debate under special rules framed by a partisan committee makes it to the last degree essential that in our system of government there be left one place for thoroughgoing debate.<sup>1</sup> No other enterprise shows so high a percentage of calamitous failures due to 'raw haste, half-sister of delay,' as does legislation. To enforce cloture by vote of a chance majority in the Senate might bring greater loss than gain. No minority, even if it consist of a single Senator, should be denied a fair opportunity to present serious argument upon the pending question. What too often has humiliated and outraged the American people is the spectacle of the Senate, proudly professing to be the most powerful legislative body in the world, yet powerless to secure a vote upon measures of the most vital importance, because its rules enable 'a little group of wilful men' or even a single Senator, not by directing serious argument to an attentive Senate, but by using 'vain repetitions as the heathen do,' by grotesque haranguing to an almost empty Chamber upon the most extraneous subjects, to prevent any action whatever. Some simple remedies are obvious: sincere co-operation between the presiding officer and the Senate in a fair and firm administration of the present rules, with the reversal of a few unfortunate precedents; amendment of the rules so as to require that in debate the Senator shall 'speak to the subject,' and that his speech shall not be padded by the wholesale 'reading in' of long excerpts from the *Record*, public documents, and other printed matter. If these slight changes were made, more drastic cloture than the rules now provide would probably prove to be neither necessary nor desirable. Obstruction would then rarely prevent or long delay action, except when applied to measures of so partisan a nature or of such doubtful constitutionality that delay or prevention of their enactment — as in the case of the Force Bill — may in later years seem even to their advocates to have been well justified.<sup>2</sup>

<sup>1</sup> Outside critics of the House often exaggerate the 'gag' upon debate in that body. See Robert Luce, *Legislative Procedure*, 90, for discussion of 'general debate' and the use of the *pro forma* amendment in Committee of the Whole.

<sup>2</sup> In *The American Senate* (1926) Lindsay Rogers devotes the greater part of the chapter on 'Cloture' to an effective setting-forth of the development of limitation of debate in the House — the tightening of the previous question, the Reed rules, and the 'special orders,' initiated by a partisan and autocratic Rules Committee, under which debate on most important measures is often allowed less than an hour, 'resulting in the abdication by the House of any functions except those of a rubber stamp.' For this reason he urges that in the Senate unfettered debate is essential, and deprecates the proposal of cloture by majority vote, lest the effect be to hamper the Senate in what he considers now to be its most notable work — investigation and criticism of executive acts and policies.



# REFERENCES

---

*Rules and Manual of the United States Senate.*

Gilfry, Henry H. *Precedents of the United States Senate*, 1789-1914.

Dawes, Charles G. Vice-Presidential Inaugural and Valedictory, March 4, 1925, and March 4, 1929.

Luce, Robert. *Legislative Procedure*, chs. XI, XII, and XIII. Boston, 1922.

Moses, George H. 'Our Senators and their Rules,' *Saturday Evening Post*, 197:6, June 27, 1925.

Hatch, Louis C., and Shoup, Earl L. *A History of the Vice-Presidency of the United States*, chs. VI and VII.

Pepper, George Wharton. *In the Senate*, ch. VII. Philadelphia, 1930.

Rogers, Lindsay. *The American Senate*, 161-90.

'The Senate Rumpus' — A Symposium on Dawes Proposals, by Donald Wilhelm, Charles G. Dawes, George W. Norris, and George Wharton Pepper, *Forum* (Oct., 1925), 574-88.



# IX

---

SENATE INFLUENCE IN FINANCIAL LEGISLATION

---



---

★

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

CONSTITUTION

The Senate may actually couch extraneous matter under that name (amendment).

JAMES MADISON (in Federal Convention)

In 1894 the House initiated, made and passed the Wilson Tariff Bill. But the Senate remade the bill, and it was the Senate bill which, without the alteration of a single line became law against the bitter opposition of both the House and the Executive.

HENRY CABOT LODGE

---

★

# IX

---

## SENATE INFLUENCE IN FINANCIAL LEGISLATION

---

### THE FEDERAL CONVENTION'S DEBATE ON FINANCIAL POWERS

---

IN THE Federal Convention the relative power of the Senate and of the House in the framing of financial measures was debated at great length. All but three of the states — 'through a blind adherence to the British model,' Rutledge declared — had denied to their upper chambers the power to originate money bills.<sup>1</sup> In the Great Compromise which was to adjust the controversy over representation, as an alleged concession to the large states (offsetting the equal vote given to all states in the Senate), it was proposed that not only should 'all bills for raising or appropriating money and for fixing the salaries of the officers of the Government,' originate in the House of Representatives, but that they should 'not be altered nor amended by the 2nd. branch.'<sup>2</sup>

This discrimination was promptly opposed by several of the ablest delegates, who held that in England and in the states it had proved either 'a trifle light as air' or a source of frequent friction, and who argued that 'in digesting & proposing money bills' the Senate would be found more capable than the House.<sup>3</sup> Nevertheless, it was tentatively accepted, and a month later it was approved in the report of the Committee on Detail.

The ensuing debate brought out most divergent views, not only as to the merits of the proposed restriction, but also as to the degree of

<sup>1</sup> Madison, *Debates*, 389.

<sup>2</sup> *Ibid.*, 286. July 5, 1789.

<sup>3</sup> Madison, Wilson, Gouverneur Morris, July 6, *ibid.*, 290 ff.

its importance in the representation compromise. That Virginia and Pennsylvania uniformly voted against giving the exclusive originating of money bills to the House showed that the largest states found no advantage in the 'concession.'<sup>1</sup> Twice the proposal was defeated, only four states voting in its favor. Yet many of the delegates could not bring themselves to give to the Senate the power even to propose amendments to money bills. They had visions of Senators, elected for a long term, establishing themselves at the seat of government and pursuing schemes for their own aggrandizement — visions not unnatural in view of the fact that the Senate, according to the plan then under consideration, was to elect ambassadors, make treaties, and exercise the 'ultimate choice' of President.<sup>2</sup> Hence the Convention voted that action on the motion to allow the Senate to propose amendments to money bills be postponed 'till the powers of the Senate should be gone over.'<sup>3</sup> It was less than a fortnight before the Convention's final adjournment that the Committee of Eleven brought in its report which shifted the 'ultimate choice' of President from the Senate to the House, and transferred from the Senate to the President the initiative as to appointments and treaty-making. Having 'gone over' the powers of the Senate in this radical fashion, the Committee ventured to recommend: 'All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate.'<sup>4</sup> Before the final vote upon this proposal, the phrasing of its last clause was changed to that used in the new Massachusetts constitution: — 'but the Senate may propose or concur with amendments as on other bills.'

#### WHAT BILLS MUST ORIGINATE IN THE HOUSE OF REPRESENTATIVES?

The Constitution's answer is: 'All bills for raising revenue.' Yet hardly a session of Congress has passed during which the question was not raised as to the extent of the restriction thus placed upon the Senate. For example, the Senate was not five months old when it denied to itself the power to originate a bill for imposing an increased duty of tonnage.<sup>5</sup> In the Sixty-Eighth Congress (1923-24) it was

<sup>1</sup> Wilson's comment, Madison, *Debates*, 389.

<sup>2</sup> Colonel Mason said that the Senate 'could clearly sell the country by means of its treaties.' Elliot, *Debates*, V, 427.

<sup>3</sup> Madison, *Debates*, 404-05, Aug. 15.

<sup>4</sup> *Ibid.*, 512, Sept. 5.

<sup>5</sup> Aug. 5, 1789, the Senate approved the report of its committee, declaring: 'Your committee conceive that the originating a bill for that purpose is, by the Constitution, exclusively placed in the House of Representatives.'



insisted on the floor of the Senate that a bill to secure uniformity as to method and rate in the taxing of gasoline in Maryland and in the District of Columbia could not originate in the Senate, since it was a 'bill for raising revenue.'<sup>1</sup> Yet the revenue to be derived from the tax was but a minor consideration.

More importance has attached to the question whether a bill for *reducing* revenue falls under the ban against all bills 'for raising revenue.' In the early years bills for reducing tariff rates or for repealing acts by which duties had been imposed were repeatedly originated in the Senate, and some of them became law.<sup>2</sup> To allay the agitation caused in South Carolina by the enactment of the 'Tariff of Abominations,' Henry Clay introduced in the Senate the bill known later as the 'Compromise Tariff.' To the protest that such a measure could not originate in the Senate reply was made that its object was not to raise but to reduce revenue, and that, since it was intended for protection and not for revenue, it did not fall in the category of revenue-raising bills. The measure was debated at length, but, in deference to the constitutional objection, it was not brought to a vote.<sup>3</sup> Meantime, identically the same bill was introduced in the House and there passed. When this House bill came to the Senate, it was promptly passed by a vote of nearly two to one, and became a law. Almost forty years later, when the House was indignantly debating a resolution to lay on the table a preposterous Senate amendment to a tariff bill, reference having been made to Clay's attempt to originate this tariff bill in the Senate, Representative Brooks declared that Clay never had any intention of bringing his bill to a vote in the Senate. 'He (Clay) told me and others that the only means he had of arousing the attention of the House and the country was by discussion in the Senate, which would compel action upon the matter in the House.'<sup>4</sup> Similar tactics have been used a century later.<sup>5</sup>

<sup>1</sup> McKellar, in Senate, Jan. 16, 1924, *Cong. Rec.*, 1025. The Senate sustained the point of order against this bill, and it was indefinitely postponed (p. 1027). Later a House bill of similar character was passed by the Senate (March 24, 1924).

<sup>2</sup> These precedents are reviewed and the entire question discussed in S. Rept. 376, 3d sess., 41st Cong.; and in S. Rept. 146, 2d sess., 42d Cong. Both reports, and other discussion of this question are to be found in G. P. Furber's *Precedents*, 282-310.

<sup>3</sup> Feb. 11, 12, 19, 21, 26, and 27, 1833. Webster said: 'This subject belongs exclusively to the House of Representatives. The attempt to evade the question by contending that the present bill was intended for protection, not for revenue, afforded no relief, for it was protection by means of revenue. It was not less a money bill from its object being protection.' (T. H. Benton, *op. cit.*, I, 321.)

<sup>4</sup> April 2, 1872, *Cong. Globe*, 2110.

<sup>5</sup> Note the Burton resolution relating to adhesion to the World Court (pp. 693-94) and the McMaster resolution in which the Senate expressed approval of downward re-

In 1924 eminent lawyers in the Senate clashed over the question whether a bill or resolution reducing revenue (by lowering income-tax rates) might not constitutionally originate in the Senate.<sup>1</sup> The right of the Senate to originate appropriation bills has been frequently under debate, as is noted below.<sup>2</sup>

The Supreme Court's interpretation of these clauses as to bills for the raising of revenue has been summarized as follows:

The construction of this limitation is practically settled by the uniform action of Congress confining it to bills to levy taxes in the strict sense of the word, and it has not been understood to extend to bills which incidentally create revenue.<sup>3</sup>

It has been held that the Senate may amend bills and even change the plan under which taxes are laid, and such action is not invalid if the amendments are concurred in by the House.<sup>4</sup>

One of the most determined controversies in recent years over the limitations upon the Senate's power to originate 'bills for raising vision of the tariff. In both cases one branch was debating and advocating action which it belonged to the other to originate.

The McMaster resolution declared that many of the rates in existing tariff schedules were excessive; that the Senate favored downward revision of such rates, establishing a close parity between agriculture and industry; that such revision should be enacted in the present session of Congress; and that a copy of this resolution be sent to the House of Representatives. It was adopted by a vote of 54 to 34. It was generally regarded as a political gesture, indicating the Senate coalition's intention to attach to the pending tax-reduction bill a series of tariff amendments, the effect of which would be to revise some of the most important sections of the Tariff Act. The following day, January 17, 1928, the House treated this resolution in cavalier fashion. The minority leader successively moved that it be referred to the Committee of the Whole House on the State of the Union and to the Committee on Ways and Means. To each motion the majority leader raised a point of order, 'that the resolution was neither a joint resolution, nor a concurrent resolution, nor a House resolution — the only kinds known to the practice of the House.' The Speaker sustained his points of order, holding that the resolution could 'not be referred to any committee under the rules.' An appeal was taken from the decision of the Chair, but the motion to table the appeal was carried, 183 to 164. Although the right of the House to initiate tariff legislation was thus asserted, the resolution had called forth evidence that a large minority in both Senate and House favored radical revision of the existing rates.

<sup>1</sup> The question was raised, March 12, by Reed (Penn.), *Cong. Rec.*, 4019; 4022.

Robinson: Oh, no; certainly not. Within the meaning of the constitutional provision which I have quoted any bill providing for the collection of revenue is a bill for raising revenue.

Reed: Such a bill or resolution as the Senator suggests would provide that revenue be not raised in part. I would suggest to the Senator that the word 'raised' means 'levying' revenue... I think it is a very serious question for all lawyers... whether the Senate has not the right to originate a repealer of a revenue law, or such a resolution repealing in part the present revenue law as is now suggested.

<sup>2</sup> Pages 455 ff.

<sup>3</sup> *The Constitution of the United States of America*, as amended to Jan. 1, 1923, Annotated, 69. Citations: *U.S. v. Norton*, 91 U.S. 566; *Twin City Bank v. Nebeker*, 167 U.S. 196; *Millard v. Roberts*, 202 U.S. 429.

<sup>4</sup> *Ibid.* Citations: *Corporation Tax Cases*, 220 U.S. 107; *Rainey v. U.S.*, 202 U.S. 310; *Kilbourn v. Thompson*, 103 U.S. 168; *Field v. Clark*, 143 U.S. 649; *U.S. v. Hill*, 123 U.S. 681.

revenue' developed in 1925 over the Postal Pay and Rate Bill. A similar measure, originated by the Senate, had passed both Houses in the previous session but had been vetoed. The veto was at once overridden in the House, but could not be brought to a vote in the Senate. In the new session the veto was sustained by a narrow vote.<sup>1</sup> Thereupon a new bill was promptly introduced, amended, and passed by the Senate, although Democrats had vigorously attacked the section proposing rate increases on the ground that all revenue-raising legislation should originate in the House,<sup>2</sup> and although House leaders had already served notice that they would ask for its immediate return to the Senate on that very ground. February 3, 1925, after spirited debate the House by a vote of three to two passed a resolution declaring:

That the bill (S. 3674) in the opinion of the House contravenes the first clause of the seventh section of the first article of the Constitution, and is an infringement of the power of this House, and that the said bill be taken from the Speaker's table and be respectfully returned to the Senate, with a message communicating this resolution.<sup>3</sup>

On the following day the House Committee on Post Offices and Post Roads presented a hastily prepared bill,<sup>4</sup> and within a week this measure, brought up under a special rule which limited debate to two hours, barred amendments from the floor and required a two-thirds majority for its passage, was passed and sent to the Senate. On advice of its committee, the Senate insisted on substituting its own Postal Pay and Rate Bill for the one just received from the House. Of course the House rejected so preposterous an 'amendment,' and the bill was sent to conference.<sup>5</sup> The first report was of a disagreement,

<sup>1</sup> Jan. 7, 1925, by a vote of 55 to 29.

<sup>2</sup> Swanson's point of order against the bill was defeated by a vote of 50 to 29, Jan. 23.

<sup>3</sup> The bill had passed the Senate Jan. 30 (*Cong. Rec.*, 2707). Feb. 3, 1925, *ibid.*, 2941-64. There was recent precedent for this action, for March 2, 1917, the Senate attached to the Naval Appropriation Bill certain amendments providing for the issuance of bonds, and passed the bill so amended. The very day of its reaching the House, the House returned it to the Senate, transmitting a resolution (H. R. Res. 550) almost identical in phrasing with the one above quoted. This action of the House was cited in Senate debate when Aug. 30, 1922, Smoot offered an amendment to the 'Bonus Bill' providing a sales tax to meet its cost. Reed made the point of order that the bill had come from the House with no provision for raising revenue, and that the Senate had no power to amend such a bill by a provision raising revenue. Both Borah and Watson protested against questions of the Senate's constitutional powers being decided by the Chair on points of order. Smoot's amendment was rejected. *Cong. Rec.*, 11964 ff.

<sup>4</sup> H. R. 11444. Apprehension had been expressed that if the House failed to reject the Senate bill and if that measure became a permanent law, 'users of the mails might later question its legal validity on the ground that it did not originate in the House.' Dispatch to *Boston Herald*, Feb. 2, 1825.

<sup>5</sup> Chairman Moses in reporting the committee's amendment to the Senate had said: 'The amendment comprises striking out all after the enacting clause, and inserting the



but a week later a compromise was reported, to which both Houses gave their assent. The House had made good its protest against the Senate's either originating a bill of this nature or foisting it upon the House in the form of an 'amendment.' The press described the new law as 'in substantially the form as that passed by the House.' Nevertheless, upon second-class rates, which had formed the center of the controversy, the conferees accepted rates carried in the Senate bill and they retained as a rider to the bill the Walsh 'corrupt practices amendment,'<sup>1</sup> which had been an incongruous feature of the Senate measure. After this fashion did the elaborate 'Federal Corrupt Practices Act, 1925,' become merely 'Title III' in an Act to re-classify the salaries of postal employees and to change postal rates.

### THE SENATE AND TARIFF LEGISLATION

---

For many years the Senate has been content to keep within the limits prescribed by the Constitution, which exclude it from originating bills which are unquestionably for 'raising revenue.' Nevertheless, with few exceptions the Senate has dominated most of the revenue-raising legislation of the past fifty years. This supremacy it has been able to assert through a most liberal exercise of its Constitution-given power to propose and concur in amendments to revenue bills, and through the strategic advantages inherent in its personnel and procedure, especially when it comes to insisting upon its own amendments in a committee of conference.

In handling matters relating to money-raising and spending, the Senate at first 'raised' a special committee to handle each bill, but in 1816, when the Senate established its system of standing committees, the Committee on Finance was second on the list for which provision

postal rates and salaries bill exactly as it passed the Senate prior to its unfortunate reception at the hands of the House of Representatives.' Feb. 11, 1925, *Cong. Rec.*, 3487.

<sup>1</sup> Moses explained that when this Walsh amendment had previously come before the Senate, he had been one of the three Senators who voted against it, 'because I do not think it is good practice to attach riders to legislation.' But since the Senate had then passed it by so large a majority, he considered that it ought now to be 'made a part of the amendment' proposed to the House bill. *Ibid.*, 3487; *supra*, 325-26, n. 4.

was made, and for over a century the Committee on Foreign Relations has been its only rival in influence. Its field of action has been practically the same as that of the House Committee on Ways and Means, but it has had the advantage of smaller membership — twenty as compared with twenty-five — and has usually included a much larger proportion of members of long experience.

Notable conflicts have developed between the Senate and the House over the framing of tariff bills. There is much of duplication in the procedure, but significant differences mark the several stages. Thus, until the Committee on Ways and Means has reported its bill, neither the Representatives nor the public can focus with any certainty upon its provisions. But by the time the bill reaches the Senate, the reports and the House debate, though brief, have brought the bill's proposals into clear view. Every interest affected is aroused to put forth its utmost efforts, 'some to maintain what they have got, others to get more, and many to defeat provisions that they consider unfavorable.' So great and so varied becomes the volume of demand for change in details that the impression is always given that 'the country disapproves' of a tariff bill as it leaves the House. The Senate Committee on Finance, therefore, usually faces a task that is far more 'political' than was that of the House committee with which the bill originated. The majority members usually meet by themselves until they have completed their reshaping of the bill. Their object is to allay the discontent of a multitude whose opposition to details might lead to party disaster. This involves compromises so many and so radical that often the bill reported back to the Senate is 'recognizable only through its title and number.'<sup>1</sup> The Finance Committee amendments for the most part have been in the way of increasing duties — either directly by raising rates, or indirectly by changes in classification — for the reason that 'high duties tend more than do low duties to conciliate those opponents who are most active.' Each Senator's pet interests come to be pretty definitely known, and the Finance Committee's task shifts from the framing of a consistent revenue bill to the patching-up of the House measure so that it will command the needed majority. In 1894 Burrows declared that since the Senate amendments to the pending Wilson Bill 'taxed raw materials and laid specific in place of ad valorem duties,' their adoption in substitution for the House bill was therefore 'a complete abandonment of the fundamental principles of tariff reform.'

<sup>1</sup> Thomas William Page, *Making the Tariff in the United States*. Note President Cleveland's comments upon the Gorman amendments to the Wilson Bill, p. 443.

The Senate bill has been constructed upon entirely different lines. It was framed upon the broad bed-rock foundation of the necessity of securing 43 votes, and all minor considerations had to give way to this great underlying principle.<sup>1</sup>

In the Senate the bill as reported by the Finance Committee stands less chance of securing passage unchanged than did the bill in the House. For here it must encounter long and searching debate, made possible by the Senate's freer rules and more lax party discipline. This may reveal defects and lead to some betterment. Sometimes substantial amendments are forced upon the committee's bill, but they are not likely to increase its consistency. Says Page: 'All in all, when the vote is taken in the Senate upon the bill as a whole, it usually shows less of logical arrangement and systematic adherence to a common standard and a definite policy than at any previous stage.'<sup>2</sup>

To the amendments thus loaded upon its bill the House is almost sure to dissent in gross. This sends the measure to conference.

It is in their dealings with financial bills that committees of conference have revealed their most undemocratic and menacing possibilities.<sup>3</sup> Within the closed doors of the conference room, the sole task is to effect the multiform compromise which will get the bill through both Houses. Although the conference committee's recommendations must be accepted or rejected as a unit, and although no recent tariff bill has been acceptable or even known in all its details to every member, nevertheless no tariff bill upon which a conference committee has agreed has ever failed to pass Congress.

For a Democratic presidential candidate to declare that 'the tariff

<sup>1</sup> Aug. 13, 1894, *Cong. Rec.*, 8476.

<sup>2</sup> *Op. cit.*, 19.

<sup>3</sup> For example, T. F. Bayard (Dem.) declared: 'We have had some specimens of legislation in committees of conference that I think were dangerous and very much to be reprehended. I refer especially to the tariff bill of last spring, in which the most unauthorized and the most unwarranted assumptions of power were indulged in by the committee of conference, changing the law, changing that upon which both Houses of Congress had expressed their agreement, and in many ways assuming to do that which never met the deliberate assent of either branch of Congress.' John Sherman (Rep.) on the same day declared: 'Now a proposition to send a bill to a committee of conference sometimes startles me, when I remember what occurred in the committee of conference on the tariff bill, last year.' (May 13, 1884, *Cong. Rec.*, 4099.) Both Bayard and Sherman had been members of the committee of conference. F. W. Taussig, *Tariff History of the United States* (1923), 232-33, cites specific instances of that committee's astounding performances. Morrison said: 'The Tariff Commission reported that the tariff on iron ore should be 50 cents a ton. The Senate said it should be 50 cents a ton. The House said it should be 50 cents a ton. Gentlemen of the conference committee reconciled the agreement of the House, Senate, and Tariff Commission into a disagreement, and made the duty on iron ore 75 cents a ton.' On two other commodities he stated the rates set successively by House, Senate, and committee as follows: Bar iron (middle class) \$20, \$20.16, \$22.40; steel rails \$15, \$15.68, \$17 a ton.



is a local issue' was bad politics, yet abundant evidence of a large measure of truth in that thesis is to be found in the history of our tariff-making. For obvious reasons, inherent in its scheme of representation, its long term, and its rules of procedure, the Senate has been the arena where localism has fought hardest and won its greatest victories.<sup>1</sup> In fact the debate upon the very first tariff bill, when the United States Senate had been organized less than two months, gave an earnest of the tone and the tactics which were to be noted in many a later tariff struggle.

(June 11, 1789.) Butler flamed away, and threatened a dissolution of the Union with regard to his State, *as sure as God was in the firmament!* He scattered his remarks over the whole Impost bill, calling it partial, oppressive, etc., and solely calculated to oppress South Carolina: and yet ever and anon declaring how clear of local views, how candid and dispassionate he was! He degenerated into mere declamation. His State would live and die glorious, etc. . . . The members, both from the North, and still more particularly from the South, were ever in a flame when any articles were brought forward that were in any considerable use among them.

(June 19.) And now the Impost bill, as sent back from the House of Representatives with an almost total rejection of our amendments, was taken up. There was but little speaking. . . . The result of the whole was that we insisted on nearly all our amendments, and I suppose they will adhere to the original bill. This seems like playing at cross purposes or differing for the sake of sport.

(June 28.) The amendments of the Senate were all adopted on the Impost bill, save only the articles of porter and coal.

Maclay had early formed a suspicion that the mercantile interest and sectional feeling were delaying action:

It now seems evident that remarkable influence is exerted to delay the impost until they get in all their summer goods. This is detestable, this is — But I have not a name for it. I wish we were out of this base, bad place. (June 5.)<sup>2</sup>

#### SENATE AMENDMENTS TO TARIFF BILLS

In a study of the present scope it is possible only to note some of the more striking instances of the Senate's exercise of its power to

<sup>1</sup> Note the perennial insistence of the Democratic Senators from Louisiana for a duty on raw sugar, and its importance in the Gormanizing of the Wilson Bill in 1894. (Taussig, *op. cit.*, 306-14.) Reporters noted with amusement that when a Republican Senator from Colorado faced the Senate to urge higher rates on graphite than those proposed by the committee, only six other Senators were present, but from two of them — staunch Democrats from Montana and Alabama — the higher rates won support. (May 24, 1922.) This amendment was not passed, but constituents in three graphite-producing states learned that their Senators had stood by them.

<sup>2</sup> Maclay, *Journal* (1891 ed.), 73; 83; 91; 68.

'propose or concur with amendments' upon bills for raising revenue.

The accompanying table presents comparative data as to the action by the House and by the Senate upon the principal Tariff Acts from 1890 to 1930. As the Committee on Ways and Means often does much of its preparation of the tariff bill during recess,<sup>1</sup> whereas the action of the Senate Committee on Finance ordinarily awaits the Senate's referring to it the bill which the House has already passed, it is not possible to secure statistics as to the length of time which these two committees have given to the consideration of these bills, although the long periods during which they have been held by the Finance Committee may deserve notice. Decidedly significant is the time accorded to the consideration of these bills by each branch, after they have been reported back by its committees.

That the Senate does indeed interpret generously its amending power is indicated by the number of its amendments, ranging from 464 upon the McKinley Bill (1890) to 2428 upon the Fordney Bill (1922).

It should be recognized that these startling figures as to the number of Senate amendments are far from justifying a hasty conclusion that in such tariff-making the work of the House is generally slovenly, or that the Senate is both the more intelligent and the more powerful branch of Congress.<sup>2</sup> A large proportion of such proposed amendments are merely corrections of typographical or clerical errors; others result because of advice or data that had not been given to the House in time by the Treasury experts; others become necessary because unexpected events have changed conditions materially since the bill passed the House; some may be intended to afford a basis for trading in conference committee. But, on the other hand, many are of substantial importance. In some cases the 'amendments' proposed by the Senate have been presumptuous and preposterous.

In 1872 the Senate substituted, under the form of an amendment, for a House bill of not more than four lines confined simply to the repeal of the tariff on tea and coffee, a bill of twenty printed pages entitled 'An Act to decrease existing taxes,' containing 'a general revision, reduction, and repeal of laws not only of customs duties, but also of internal revenue taxes.' After strong denunciation of this

<sup>1</sup> Taussig declares that such deliberation by the majority members of a prospective Ways and Means Committee pays 'scant attention to the letter of the law' (*op. cit.*, 326). Note similarly premature action by the Finance Committee (*infra*, 444).

<sup>2</sup> Over half of the 847 amendments to the bill of 1909 were of 'substantial importance,' says Taussig (*op. cit.*, 375).

LEGISLATIVE SCHEDULE OF TARIFF BILLS, 1890 TO 1922 \*

Date and Name	Reported by Ways and Means to House	Passed House	Reported by Finance Committee to Senate	Passed Senate	Senate Amendments	Became Law
1890 McKinley H. R. 9416	April 16, 1890	May 21, 1890	June 17, 1890	September 10, 1890	464 †	October 1, 1890
1894 Wilson H. R. 4864	December 19, 1893	February 1, 1894 ‡	March 20, 1894	July 3, 1894	634 †	August 28, 1894
1897 Dingley H. R. 379	March 19, 1897	March 31, 1897	May 4, 1897	July 7, 1897	872 †	July 24, 1897
1909 Payne H. R. 1438	March 18, 1909	April 9, 1909	April 12, 1909	July 8, 1909	847 †	August 5, 1909
1913 Underwood H. R. 3321	April 22, 1913	May 8, 1913	July 11, 1913	September 9, 1913	676 †	October 3, 1913
1922 Fordney H. R. 7456	July 6, 1921	July 21, 1921	April 11, 1922	August 19, 1922	2428 †	September 22, 1922
1930 Hawley H. R. 2667	May 9, 1929	May 26, 1929	September 4, 1929	March 24, 1930	1253 †	June 17, 1930

\* In every case the intervals (1) between the bill's passing the House and its being referred by the Senate to the Committee on Finance, and (2) between its passing the Senate and its being taken up in conference, were too short to make their tabulation significant.

† While the great number of Senate amendments indicates the thorough scrutiny which a House tariff bill receives at the hands of the Senate Committee on Finance, hundreds of amendments may be made without making any momentous change in the character or effect of the bill; a single trifling change in phrasing or in paragraph numbering may necessitate a score of others. The statement which accompanied the report of the conference committee on the Fordney Tariff Bill grouped its thousands of amendments thus: Nine 'make clerical changes, and the Senate recedes'; many hundreds 'make clerical changes, and the House recedes'; others 'make changes in paragraph numberings'; others 'make changes in paragraph numberings and the House recedes, with amendments making further changes in paragraph numberings.'

‡ Congress was in recess from December 21 to January 3.



action by the Senate from such House leaders as Dawes, Garfield, and Hoar, the House by a vote of 153 to 9 adopted a resolution declaring that such amending was in conflict with the Constitution's true intent and purpose, and that 'said substitute do lie upon the table.'<sup>1</sup>

In 1883 the Senate's 'amendment' consisted in striking from the House tariff bill all after its enacting clause, and substituting the Senate's own bill, which was adopted by the House.<sup>2</sup> In 1888 the Republican Senate Finance Committee deliberated and framed a tariff measure intended to offset the Mills Bill, prepared by the House Democrats, but neither measure reached enactment. In 1890 the Finance Committee quite promptly returned the McKinley Bill to the Senate without a written report, its chairman stating that the bill was 'substantially about the same as the measure reported by the Senate committee two years ago.'<sup>3</sup> Its reciprocity clause was said to have been 'a Senate idea, put upon the bill by the Senate.'<sup>4</sup>

'In 1894 the House initiated, made and passed the Wilson Tariff Bill. But the Senate remade the bill, and it was the Senate bill which, without the alteration of a single line, became law against the bitter opposition of the House and the Executive.' A more striking illustration of Senate domination in tariff-making is not to be found. Supposed resentment at the effects of the McKinley Bill had resulted in sending to the Fifty-Third Congress a Senate and a House both controlled by Democrats. The Ways and Means Committee painstakingly framed a tariff bill intended to reduce duties and to serve as an approach to the policy of tariff for revenue only, which Cleveland had made the leading issue of the campaign. After brief debate and without material alteration this bill was passed by the House, 204 to 140. In the upper branch was a group of Democratic Senators, headed by Gorman, who were high protectionists. No one of them was a member of the Committee on Finance, to which the bill was

<sup>1</sup> April 2, 1872, *Cong. Globe*, 2105-12. Garfield, *Works*, I, 699:

'To admit that the Senate can take a House bill consisting of two lines, relating specifically and solely to a single article, and can graft upon that bill in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the Constitution which we are considering, and may rob the House of the last vestige of its rights under that clause.'

In the Virginia ratifying convention, 1788, Grayson had said: 'The Senate could strike out every word except the word "Whereas" or any other introductory word, and might substitute new words of their own.' Elliot, *Debates*, III, 377.

<sup>2</sup> H. C. Lodge, 'The Senate of the United States,' in *A Frontier Town*, 84.

<sup>3</sup> Morrill, June 18, 1890. *Cong. Rec.*, 6207.

<sup>4</sup> Catchings, *Cong. Rec.*, July 7, 1894, 7189.

at once referred; but their influence soon made itself felt, and when the bill was passed by the Senate, it bore 634 amendments, and its character and consistency as a fulfillment of Cleveland's program and of the Democratic Party pledges had been utterly eliminated.<sup>1</sup> The Wilson Bill had been transmogrified into the Gorman Bill.<sup>2</sup> Upon its return to the House there was a stormy debate; Wilson and Catchings declared their purpose to 'reform' the bill, while Reed and Cannon, with brutal and contemptuous cynicism, asserted that the Democrats would have to agree to the Senate amendments.<sup>3</sup> The House non-concurred to the Senate amendments, and the bill was sent to conference, from which it was presently reported that neither group would yield. In speaking to his motion that the House insist upon its disagreement and ask for a new conference, Chairman Wilson, by permission, read a long letter which he had received from President Cleveland, urging him to resist to the uttermost giving assent to the Senate amendments. It declared:

Every true Democrat and every sincere tariff-reformer knows that this bill, in its present form and as it will be submitted to the conference, falls far short of the consummation for which we have long labored, . . . and which in its promise of accomplishment is so interwoven with Democratic principles and Democratic success, that our abandonment of the cause or the principles upon which it rests means party perfidy and party dishonor.<sup>4</sup>

Conferees were again named, but after several weeks of fruitless struggle, Wilson had to bear the humiliation of moving that the House recede and that it agree to the Senate amendments. Two hours were to be allowed for debate. Said Reed: 'You are going to give an hour on a side to discuss 600 amendments, no one of which has been touched by this House — one-tenth of a second for each

<sup>1</sup> See Burrows's characterization, p. 437.

<sup>2</sup> Wilson said: 'No tariff bill ever went from the House of Representatives to the other Chamber on which longer and more careful and more detailed and more conscientious work was bestowed' than upon this bill; and this was probably true. *Cong. Rec.*, 7191.

<sup>3</sup> Reed: 'The idea of his talking about free raw material being a Democratic principle, and telling us that he was trying to carry it out! Free raw material, in the last essence, is not to be found on the face of the earth. It is a mere chimera, a mere illusion of the schoolmen, which, the moment it got before those practical gentlemen in the Senate, men of business, . . . vanished, leaving not a wrack behind.' July 7, 1894, *ibid.*, 7192.

Cannon: 'It is absolutely morally sure that substantially the Senate amendments are to be adopted. You are to open your mouths and swallow them down, and call them "tariff reform." In Heaven's name, act as quickly as you can!' *Ibid.*, 7195.

<sup>4</sup> For Gorman's reaction to this letter (printed in *Cong. Rec.*, 7712-13), see his indignant explanation and protest (*ibid.*, 7803-09), and D. S. Barry, *Forty Years in Public Life*, 194-97.

amendment.<sup>1</sup> To this the harried Wilson replied: 'I shall not attempt to explain the merits or to dwell upon the demerits of the six hundred and odd amendments to this bill, which this House is about, of necessity, to concur in.'<sup>2</sup> Since it was evident that the combination in the Senate was such that no bill at all could be passed unless it met the precise demands of Gorman and his friends, the House agreed to Wilson's motion, 182 to 103.<sup>3</sup> By direction of the Democratic caucus, Wilson forthwith sent to the desk for immediate consideration four successive bills providing that there be transferred to the free list bituminous coal, iron ore, barbed-wire fencing, and sugar. Every one of these, with but a few minutes' debate, and without formality of reference to a committee, was passed. In the Senate each of them was reported favorably from the Committee on Finance, but Congress adjourned a week later without their having been acted upon. The Gormanized Wilson Bill became a law without the President's signature.<sup>4</sup>

In preparation for the tariff-making of 1897 the Republican members of the Senate Committee on Finance met, even before Congress assembled, and virtually framed a tariff bill of their own. Its principal features found expression in the 873 amendments placed upon the Dingley Bill by the Senate.<sup>5</sup> When the bill emerged from the compromising in the Senate and in conference, it bore little resemblance in plan or method to the bill which the House had originated.<sup>6</sup>

The Tariff Bill of 1909 was referred to the Committee on Finance Saturday, April 10. The following Monday afternoon it was reported back to the Senate bearing 847 amendments — sufficient evidence in itself that Chairman Aldrich practiced preparedness. Asked in the Senate whether the bill, as reported, had been read in full committee, he declined to answer on the ground that it was 'not customary to relate on the floor what transpired in committee room.' Bailey, however, declared: 'The bill was not read to the committee this morning, and no consideration was given to the bill or any item of it. It was reported without the minority having had an opportunity

<sup>1</sup> *Cong. Rec.*, 8470, Aug. 13.

<sup>2</sup> *Ibid.*, 8474.

<sup>3</sup> 'The House, in the end, after protesting that it could never yield, accepted them [the Senate amendments] *en bloc*, an act of stultification of such enormity as to damage seriously the morale of the House. It was an abject surrender of the noble prestige of the House under the Constitution to the Senate oligarchy headed by Arthur P. Gorman of Maryland.' G. R. Brown. *The Leadership of Congress*, 104.

<sup>4</sup> *Cong. Rec.*, 8666, Aug. 28.

<sup>5</sup> D. R. Dewey, *Financial History of the United States*, sec. 204.

<sup>6</sup> Taussig, *op. cit.* (1923), 328.



to read a line of it.' <sup>1</sup> The bill was presently sent to a committee of conference consisting of five Republican and three Democratic managers from each House. The ten Republicans got together by themselves and made the decisions, to which the Democratic members registered only a partisan dissent. Says Taussig:

Such has been the procedure with all tariff legislation of the last generation. What passed in the conference committee can only be guessed, but guessed with some certainty: weary sessions, hurried procedure, give-and-take, insistence by this or that member among the ten on some duty in which he was particularly interested. Irresponsibility in legislation reached its acme.

The history of this bill was exceptional in that the President, while the bill was in conference, brought pressure to bear in favor of lower duties than Senate members were planning, ensuring in particular the abolition of the duty on hides. Exceptional also was the number and the ingenuity of the 'jokers' which found their way into the bill while in the Finance Committee or in conference. In contrast with the efforts of the House to 'maintain publicity and to prevent such concealed items, in the Senate things went in star-chamber fashion, and the familiar process of log-rolling and manipulation was again to be seen.'

In 1913 the Democrats secured control of both branches of Congress. On the basis of a general revision measure which had been worked out by the Committee on Ways and Means during the previous session, under the able leadership of Underwood the new tariff bill was promptly carried through the House. In the Senate it lagged all summer in wearisome debates. Six hundred and seventy-six amendments were put upon the bill by the Finance Committee, but in the

<sup>1</sup> Daniel said: 'We had the opportunity to vote on one question — whether or not this bill should be favorably reported. Of course we voted "No." We knew nothing about it, and had had no opportunity to know.' Commenting upon the statement that it had been the practice of the majority members of the Finance Committee to 'perfect' their bill without giving the minority an opportunity to question witnesses, confer with the experts consulted, or even to know the rates and the administrative procedure to be proposed, he declared: 'I regard the practice as oppressive, as tyrannous, and as an impediment to full and dutiable (*sic*) public service.' (April 12, 1909, *Cong. Rec.*, 1332-33.) Aldrich had frankly said: 'I will state that the report is made on behalf of the majority of the committee.' D. S. Barry, for some years Aldrich's secretary, writes: 'Tariff bills originate in the House, but it is generally the substitute prepared by the Senate Committee on Finance as an amendment to the House bill which becomes a law. For twenty-five years or more Senator Aldrich was chairman of the subcommittee of the Finance Committee that prepared that substitute, whether the chairman happened to be John Sherman or Justin Morrill, Republicans, or Daniel W. Voorhees, Democrat, or Mr. Aldrich, himself. This is why Aldrich became the target for the shots of those who sought to destroy the protectionist principles — because he was a protectionist, pure and simple.' (*Forty Years in Public Life*, 159.)

main they were in the direction of lowering the House rates, and showed 'little evidence, if indeed any at all, of the sort of manipulation which had affected the details of the tariff acts of 1890, 1897, and 1909.'<sup>1</sup>

For dilatoriness rather than deliberation a record was established in the enactment of the Tariff Act of 1922 which it is to be hoped will never be equaled.<sup>2</sup> Nearly six months after hearings before the Ways and Means Committee had been begun, the bill was introduced in the House, June 29, 1921, and referred to the Committee on Ways and Means. It was reported, July 6, and a fortnight later passed the House. The next day, July 22, it was referred to the Senate Committee on Finance. Nearly nine months had passed before it was reported back to the Senate, April 11, 1922, bearing 2428 amendments. After some nine weeks of rambling debate, the chairman of the Committee on Finance brought to the attention of the Senate a resolution which had been adopted by the Republican Conference that the tariff bill and one other 'shall be pressed to their final disposition as expeditiously as possible.'<sup>3</sup> A few weeks later, since the talk bade fair to last all summer, an attempt was made to apply cloture, but the vote fell short of the required two-thirds.<sup>4</sup> Despite the fact that the bill had been before the Senate for consideration more than four months when by a unanimous-consent agreement debate was cut off at a fixed hour, August 15, hundreds of amendments to the House bill recommended by the Finance Committee — including all those dealing with its administrative features — then had to be acted upon without discussion or explanation.<sup>5</sup> The bill passed the Senate August 19, thirteen months after it had been received from the House. The details of the bill had to be settled in conference. Twenty days of feverish bargainings and adjusting did not remove all the obstacles; the House insisted on sending it to conference a second time. It became a law September 19.

<sup>1</sup> Taussig, *op. cit.*, 407. For samples of Senate 'jokers' see 402 and 403.

<sup>2</sup> *Ibid.*, 417.

<sup>3</sup> June 20, 1922, *Cong. Rec.*, 9011. The other bill selected for special pressure was the amended Soldiers' Compensation Bill.

<sup>4</sup> Petition filed July 5, *ibid.*, 9982. Signed by 52. Vote, July 7; 45 to 35. *Ibid.*, 10040.

<sup>5</sup> Aug. 15, 1922, *ibid.*, 11366. Reed (Mo.) made vigorous protest against voting upon amendments which had not been considered by the Committee on Finance, but only by its majority members, but his point of order was not sustained.

For a breezy account of the procedure in enacting a tariff bill, based somewhat on his own observations and experiences in connection with the Act of 1922, see George Wharton Pepper's *In the Senate*, 39-46.

In the conference adjustments Representative Garner, a House manager, declared that the House had yielded more than thirty times as often as the Senate.<sup>1</sup> In most cases the Senate raised the rates that had been decided upon by the House. This was most notably the case in the rates on agricultural commodities, reflecting the pressure from the farming states of the Far West, whose representation was proportionally a far larger element in Senate than in House membership.<sup>2</sup> Perhaps the most notable single modification in the bill brought about by Senate amendment was that introducing the 'flexible tariff' feature, which empowered the President to make changes in tariff rates based upon recommendations from the Tariff Commission. A few years later, the 'workings' of this innovation in tariff administration seemed to some Senators a particularly promising subject for a Senate investigation.<sup>3</sup>

Bound by a conditional promise made in the last week of campaign, President Hoover promptly issued a call for a special session of Congress, declaring that 'legislation to effect further agricultural relief and legislation for limited changes of the tariff cannot, in justice to our farmers, our labor, and our manufacturers, be postponed.' Congress convened April 15, 1929.

For several months the Republican members of the Committee on Ways and Means had already been at work on their own tariff-revision bill which went far afield from the 'limited changes' proposed by the President. This bill was introduced by Chairman Hawley, May 7, and at once referred to his committee, whose Democratic members then for the first time saw its provisions. Two days later it was reported out from the committee, and its consideration began in the Committee of the Whole House on the State of the Union, where general debate continued for a fortnight. May 24, a drastic special rule was brought in by the Committee on Rules, by agreement submitted to debate with a time allowance of forty-five minutes to each side, and then adopted by an almost strictly party vote. In accordance with its terms, general debate upon the bill at once was closed, but consideration of the bill for amendment under

<sup>1</sup> Sept. 13, 1922, *Cong. Rec.*, 12503. He frankly told his colleagues: 'In the House, under your special rule, you took from the House the opportunity to consider the bill in an intelligent way, only permitted a few amendments to be voted upon, and the result was that the Senate had to perfect the measure; and when you came to consider the Senate amendments, the House conferees were convinced that their bill was imperfect, so imperfect that they had to yield to the United States Senate conferees on more than 2300 amendments.'

<sup>2</sup> Taussig, *op. cit.*, 454.

<sup>3</sup> Page 559.



the five-minute rule in the Committee of the Whole continued until a fixed hour on the fourth day, when the bill was pressed to a final vote.<sup>1</sup>

In sharp contrast with the Senate's later procedure in dealing with this bill there should be noted the scant time allowed for consideration in Committee of the Whole, the absolute cutting-out of all debate in the House, and the practical impossibility of any private member's securing consideration, still less a vote, upon any amendment not proposed by the Committee on Ways and Means.<sup>2</sup> In accordance with this predetermined schedule, the Hawley Bill was brought to a vote and passed by the House three weeks from the day when it was introduced.<sup>3</sup> The next day the House resolution requesting concurrence in enacting this bill was presented in the Senate, and the bill was at once referred to the Committee on Finance. For more than three months of a Washington tophetic summer the committee was deliberating on this bill.<sup>4</sup> Hardly a fortnight had passed when Borah introduced a resolution instructing the committee to 'limit its hearings, deliberations, recommendations and report upon the tariff bill to the agricultural and directly related schedules,' but this was rejected by a single vote of 38 to 39.<sup>5</sup> Not until September 4 was the bill, bearing a thousand and more 'majority' amendments, reported in the Senate. There the 'coalition' was in control, and apparently endless debate began. At the end of October, more than five months after the bill came up from the House, President Hoover is-

<sup>1</sup> H. Res. 46. It continued: 'The bill with all amendments . . . shall be reported to the House, whereupon the previous question shall be considered as ordered on the bill and all amendments to final passage without intervening motion except one motion to recommit. The vote on all amendments shall be taken en gross except when a separate vote is demanded by the Committee on Ways and Means on an amendment offered by the said Committee.'

<sup>2</sup> To this last criticism Floor Leader Tilson replied: 'All that we have done by this resolution is to say that the Committee on Ways and Means, having studied this bill for five months, should have preference in presenting such amendments as in their judgment this House ought to consider.' He called attention to the fact that in this bill there were ten thousand items, that they were related and interrelated to each other so that, 'if we should consider, without restriction, amendment after amendment, passing one and failing to pass another, a crazy quilt would be orderly in comparison with what the bill would be by the time it was finished.' Note also his comparison with the method by which amendment was restricted by the Democrats in the consideration of the Underwood Bill, in 1913.

<sup>3</sup> May 28, 1929, by vote, 264 to 147. *Cong. Rec.*, 1895.

<sup>4</sup> By concurrent resolution, Congress recessed June 19, 1929, the Senate to reconvene Aug. 19, and the House Sept. 23. (S. Con. Res. 16, *Cong. Rec.*, 3070, 3085.)

<sup>5</sup> S. Res. 91, June 17, 1929, *ibid.*, 2975. Nevertheless, for the fate of this attempt to revise the tariff the House may have been chiefly responsible; for its own bill in nowise conformed to the President's call for a strictly limited revision.

sued a public statement, calling attention to the fact that, with fifteen schedules to be worked out, the Senate had not yet completed Schedule I. He urged the Senate leaders to get together and expedite the early completion of the schedules, 'and thus send the bill to conference with the House within two weeks.' In the Senate Chamber that suggestion that the Senate finish its task in a fortnight met with resentment and derision. It proved impossible to secure responsible leadership, and the special session, which had been called solely for the purpose of enacting farm-relief legislation and 'limited changes in the tariff' which 'could not in justice . . . be postponed,' came to an end, November 22, with the Senate still less than halfway through its schedules.

After a week's recess, Congress convened in regular session. Through the winter months tariff debate in the Senate dragged on. Not till the last week in March was the bill brought to a vote, and passed.<sup>1</sup> Ten months had elapsed since it had been sent to the Senate. It was now returned to the House, bearing 1253 amendments. The number was not especially significant, except as indicating the close scrutiny which the bill's provisions had received. All but a very few of the rates in question could be promptly compromised; but two amendments were radical and highly provocative, in opposition to the known wishes of the House and of the President. A Senate amendment required that the Tariff Commission be made bipartisan, and that the President's power as to rate changes based upon its recommendations should be greatly reduced. Another amendment was a direct challenge to the House, and utterly in conflict with what the President, the Secretary of the Treasury, and the Secretary of Agriculture believed to be sound policy.<sup>2</sup> At the very time when the Hawley Tariff Bill was first under consideration in the House, the Senate was debating the Farm Board Bill in which was incorporated the so-called 'Export Debentures' provision. 'Coalition' Senators aided by most of the Democrats by a narrow majority defeated the majority leader's motion to strike out this section of the bill.<sup>3</sup> The House rejected it, and, when the bill went to conference, by a vote of more than two to one instructed the managers for the House to insist that that provision

<sup>1</sup> March 24, 1930, by a vote of 53 to 31.

E. E. Schattschneider (*Politics, Pressures and the Tariff*) cites its illustrations from this Smoot-Hawley Tariff.

<sup>2</sup> See letters from the President and Secretaries Mellon and Hyde to Senator Nye, of April 20, 1929, in *Cong. Rec.*

<sup>3</sup> May 8, 1929, by vote of 44 to 47.

be cut out; and that had to be done. Defeated in their attempt to secure 'Export Debentures' in the Farm Board Bill, five months later the same combination of Senators succeeded in passing Norris's amendment, which made provision in the Tariff Bill for the issuance of 'Export Debentures.'<sup>1</sup> Since every one of the Senate majority conferees had voted against both of these amendments, question was raised on the floor of the Senate as to what assurance there was that these amendments would be insisted upon; whereupon each of the three Republican conferees gave solemn pledge to carry out the 'mandate' of the Senate, never yielding upon these crucial amendments unless instructed by the Senate so to do.

When the bill came back to the House, the majority leaders at once assumed control: the Rules Committee reported out a special rule, under which there would be but a single vote — that on sending the bill, as it came from the Senate, to conference, without first giving a chance for the House to vote on any one of the highly controversial amendments.<sup>2</sup> After only two hours of debate, the previous question was ordered, and then came the adoption of this rule, refusing to accept the Senate amendments, and sending the bill to conference.<sup>3</sup> In less than three weeks all rates but five had been adjusted. But a determined deadlock developed over the Senate amendments as to the 'Flexible Tariff' and 'Export Debentures.' Evidently the bill was virtually dead unless the Senate conferees could get permission to 'arbitrate fully and freely' on those two issues. Finally, Chairman Smoot came before the Senate with a request that the conferees be released from their pledge not to yield on these points. By the closest of votes the Senate receded from insisting on these two amendments.<sup>4</sup> Thereafter the 'Export Debenture' section was promptly struck out in conference, the 'Tariff Commission' section was compromised, and agreement reached as to the rates that had been in dispute.<sup>5</sup> The

<sup>1</sup> Oct. 19, 1929, by vote of 42 to 34. *Cong. Rec.*, 4694.

<sup>2</sup> The particular rates most at issue were those on sugar, cement, shingles, lumber, and silver. The House leaders agreed that these would be brought back to the House for separate vote, before yielding by the House managers.

<sup>3</sup> By vote of 241 to 153. Nineteen Republicans voted against this rule.

<sup>4</sup> The Senate receded on 'Debentures' by a vote of 43 to 41; on the 'Tariff Commission' the vote stood 42 to 42, but was carried in the affirmative by the casting vote of the Vice-President.

<sup>5</sup> A novelty in conference procedure upon this tariff bill — in contrast with any similar conference for over a century — was that the Senate and House conference leaders vied with each other in giving publicity day by day to the agreements that were being effected. In the last stages of its progress, the fate of the bill was put in serious jeopardy by a ruling by Vice-President Curtis which sent the bill back to conference, on the



Senate then passed the bill by the narrow margin of two votes,<sup>1</sup> and the following day it passed the House by a vote of 222 to 153.

More than a year had passed since it was sent to the Senate by the House. Few tariff acts in our history have been so obviously instruments of barter and compromise.<sup>2</sup> In the preceding campaign the Democrats had made no pretense to adhere to a policy of tariff for revenue only, and had shown a decidedly friendly attitude toward 'protection,' and Democratic Senators were ready for team-play with 'Coalition Republicans' — who were in a position of power but of no responsibility — in any action that would advantage their individual states, or embarrass the Administration. The product of such compromising was so unsatisfactory to the President that it was

ground that the conferees had exceeded their authority by inserting 'new matter' in the clause relating to the 'Flexible Tariff.' May 27, 1930.

<sup>1</sup> June 13, 1930, by vote of 44 to 42.

<sup>2</sup> One Representative commented that the difficulty in framing the tariff bill lay in the fact that in the House there were 435 tariff-framers, each trying to get something for his own district. On the floor of the Senate the trading of the conference committee room was brought to light. Harrison, a Democratic conferee from Mississippi, had been taunting the Republicans for their unwillingness to make concessions:

Shortridge (a Republican conferee from California): They did recede from a tariff of seven cents on long staple cotton. (A product on which Mississippi had almost a monopoly.)

Harrison: That is one of the great things in the conference report. . . . There is not one speck on my record. I have stood for Mississippi, as I propose to stand for her, in conference, on the floor here, and later when the bill comes up for passage . . . I shall stand for her.

Shortridge: I am in favor of protection for every state, for every industry in every state, whether it be Mississippi or California.

Later in the debate, when Harrison was again nagging the Republicans, came this colloquy:

Smoot: The Senator wants the Senate to understand that he has no personal interest in the duty on long-staple cotton. Did he not tell the conferees that if they did not agree to the duty on long-staple cotton, there would not be any bill?

Harrison: Yes, that is exactly what I said to them.

Again, when Harrison was indulging in one of his jeering tirades, Smoot rebuked him for insincerity, and brought guffaws from the understanding Senate by his blunt declaration: 'The Senator from Mississippi will pretend to oppose this tariff bill, with the fervent hope that it will pass.' Press report, May 27, 1930.

Another colloquy in the debate on this bill showed the willingness of many members to swap tariff favors:

Waterman (Col.): I am frank to say that, by the Eternal, whenever a proposition comes up on the floor of the Senate, with reference to a tariff upon any article, if any Senator votes against a tariff upon articles produced in *my* state which are not produced in *his* state, I will not vote for a tariff upon articles produced in *his* State. We might as well understand that now as at any other time.

Glass (Va.): I may have a very defective sense of discrimination, but I am unable to see the difference between a doctrine of that sort and a plain trading in votes.

Waterman: I do not care what the Senator may call it. . . . I shall practice it as long as I sit here. (March 19, 1930.)

Cumulative evidence that the tariff was no longer a party question was afforded by the majority leader's putting into the *Record* the list of votes cast by Democrats either for the positive increase of existing rates or against their reduction. For example: Ashurst, 32; Bratton, 37; Connally, 33; Copeland, 54; Dill, 33; Fletcher, 35; Hawes, 32; Hayden, 34; Kendrick, 73; Pittman, 54; Ransdell, 78; Broussard, 103; Sheppard, 44; Thomas (Okla.) 32; Trammell, 44; Wagner, 34.

questioned whether he would veto it. President Cleveland had allowed the obnoxious Gormanized Wilson Bill to become a law without his signature; President Taft hesitated long before bringing himself to approve the Payne-Aldrich Bill, and then signed it, but issued a statement severely criticizing some of its provisions. President Hoover followed neither precedent: before signing the bill he at once issued a statement declaring his intention to approve it, because 'nothing would contribute to retard business recovery more than this continued agitation' for tariff change; because its provisions would benefit the farmers; and because the application of the 'flexible clause' would remove whatever gross injustice the measure might contain.

In the Seventy-Second Congress the Democrats secured control of the House, and at once undertook to frame a tariff bill which, without directly changing the rates prescribed by the Hawley-Smoot Act, would take from the President his limited power of raising or lowering rates on individual commodities upon recommendation from the Tariff Commission, and would bring each of that commission's recommendations directly to Congress for action. This bill was vetoed by the President.

Later in the session the House passed a 'Tax Bill,' designed to provide over a billion dollars of revenue to meet emergency needs in that year (1932) of business depression and critical unemployment.<sup>1</sup> As framed by the Committee on Ways and Means, its chief item was a manufacturers' sales tax, but this proposal was rejected by the House. Unsuccessful attempts were made to amend the bill so as to secure increases of the Hawley-Smoot rates upon certain commodities. When sent to the Senate, it provided new or increased taxes upon individual and corporation incomes, gifts and inheritances, communications, securities, etc. In the Senate the record of this bill affords a thoroughly characteristic illustration of what there can be accomplished by team-play among Senators from states of diverse economic interests, but each having 'its equal suffrage in the Senate.' The alliance between 'Coalition' Republicans and Democrats succeeded in gaining concessions from the Committee on Finance.

Four tariff items had been written into the so-called 'Tax Bill,' when it reached the Senate floor. Under the disguise of excises, duties had been levied on imports of coal, oil, lumber and copper. This combination of four raw materials represented a geographical range wide enough

<sup>1</sup> Revenue Revision Act (H. R. 10236).

to get the votes necessary. The coal regions of the East swapped votes with the oil states of the Southwest. The lumber areas of the Northwest exchanged strength with the copper states.<sup>1</sup>

Earnest opposition by leading Republicans and Democrats failed to secure the exclusion of these incongruous tariff items in a tax bill. The fruit of log-rolling, their presence in that law is of bad omen for the future of tax legislation.

<sup>1</sup> *New York Times*, May 19, 1932, p. 5.

#### THE INFLUENCE OF THE 'UPPER CHAMBERS' IN FINANCIAL LEGISLATION IN PARLIAMENT AND IN CONGRESS

It happened that in the early months of 1932 both in Parliament and in Congress legislation had to be enacted providing for a large increase in revenue. The contrasts in procedure are striking — particularly as to the part taken by the 'Upper House' in the revenue-raising.

##### *In Parliament.*

Wednesday, Feb. 25, 1932, the British Tariff Bill passed the House of Commons by a vote of 442 to 62. It was called the 'Swan Song of British Free Trade,' for — with certain notable exceptions — it imposed a 10 per cent duty on all imports into Great Britain.

This revolutionizing revenue bill passed up to the House of Lords Wednesday night, and its further schedule was forecast as follows: It was to be given its first reading in the House of Lords Thursday, pass through its remaining stages the following Monday, and — with Royal assent! — become effective Tuesday, the sixth day after its passing the House of Commons. From the moment when the Commons' vote was announced, cargoes were being raced to British ports, to escape the 10 per cent increase in duties sure to become effective within a week.

##### *In Congress.*

The United States Revenue Revision Bill passed the House of Representatives April 1. April 4 it was referred to the Senate's Committee on Finance. Five weeks later, May 9, it was reported back by Chairman Smoot, as a tax measure. But then came the dickers, described above. Senator Tydings, disgusted with such trading, introduced amendments providing for 504 tariff changes for the advantage of Maryland industries! He shouted: 'Have we gone mad? Have we no idea that if we carry this period of unrest from one week to another, a panic will break loose which all the tariffs under heaven will not stem? Yet we sit here to take care of some little interest in this State or that, instead of rising above petty sectionalism and acting for the nation. "My State! My State!" My God! Let's hear "My Country!" What good is your State if your country sinks into the quagmire of ruin?' He requested permission to vote 'Present,' his reason being that he could not vote for a tax bill containing tariff provisions which were entirely unjustified, and which gave no prospect of balancing the budget.

The vote passed the Senate by a vote of 72 to 11. Compromises on minor points were reached in Conference Committee, but those tariff dickers still stood. The Conference Committee's report was approved in the Senate by a vote of 40 to 35; in the House, without a record vote. It became a law June 7.

The interval of two months between the date of the bill's passing the House and its becoming a law was relatively short — compared with the thirteen months of uncertainty in the case of the Hawley-Smoot Bill! But Senate amendments had utterly changed the character of the bill, with no gain in its revenue-raising capacity.

Acknowledging that his view may not be entirely free from prejudice, Judge William R. Green (Chairman of House Ways and Means Committee, 68th to 70th Congress) comments in letter to the writer, Oct. 3, 1932: 'While the theory may be good that some other body should go over the legislation passed by the House and correct mis-



## SENATE HANDLING OF OTHER REVENUE-RAISING BILLS

---

Space limits do not make possible detailed analysis of the Senate's action in relation to successive 'internal revenue bills.' The record of a single bill — the Revenue Act of 1928 — may serve to illustrate how different is the rate of progress of such a bill in the House and in the Senate. On the opening day of the session the bill was introduced by the Chairman of the Committee on Ways and Means, doubtless after many weeks of preparation. It was referred to that committee, and on the following day, December 7, 1927, was reported back to the House. Eight days thereafter it was passed, and sent to the Senate. It remained in the hands of the Committee on Finance from December 16, 1927, to May 1, 1928. Then followed three weeks of debate, ending with its passage, with 226 amendments. In conference committee these differences were readily cleared away, with a single exception — the Senate amendment providing for publicity of income-tax returns. Smoot came back to the Senate, with the request that the Senate conferees be instructed to recede from that amendment. He explained that the House conferees were a unit against it and would not yield, and that the Senate conferees did not feel warranted in proposing that the Senate recede, since every one of them had voted against the proposal when it was before the Senate. The instruction was granted, and with this obstruction removed the bill was speedily passed.

A recent innovation in the creation of the Joint Committee on Internal Revenue Taxation may result not only in much-needed simplification in that form of taxation, but also in investigation of its administration and in publicity as to its defects.<sup>1</sup>

takes which may have happened through haste or oversight, in practice the result in almost all cases is that the greater part of the amendments are adopted merely in the interests of some individual Senators and do not really have the approval even of the Senate itself. No other country has such a system and probably in no other country would it be tolerated.'

<sup>1</sup> Revenue Act of 1926 (69th Congress, Public No. 20), sec. 1203. For discussion of this committee, see 'Joint Committees,' p. 313.

## THE SENATE AND APPROPRIATION BILLS

## MUST APPROPRIATION BILLS ORIGINATE IN THE HOUSE?

Literalists have insisted that its final adoption of the phrase, 'All bills for raising revenue' in place of 'all bills for raising or appropriating money and for fixing the salaries of the officers of the Government,' shows the Convention's deliberate intent to confine within the narrowest limits the exclusive power as to originating bills which was to be assigned to the House. But no such purpose is made clear in the debates during the few days which intervened between the Convention's adoption of that formula and its final adjournment. Furthermore, the delegates frequently used 'money bills' and 'revenue bills' as synonymous, and in contemporary usage, both in England and in America, 'money bills' often included bills for the spending as well as for the raising of money.

Although almost unbroken practice of the past seventy-five years has made it seem a part of the unwritten Constitution that general appropriation bills shall originate in the House, the Senate has not only originated every kind of special appropriation, but it has asserted its right to originate general appropriation bills, as well.<sup>1</sup>

The Federal Government under the Constitution had been in existence less than a decade when the Senate with good reason complained of the tardiness with which appropriation bills were sent up from the House.<sup>2</sup> By implication the Senate's resolution declared that the Senate itself had the right to initiate such bills. In 1816 a bill was introduced in the Senate and passed making additional appropriations for that year, and this was agreed to later by the House without protest.<sup>3</sup> In general the dilatoriness of the House apparently grew worse, until, in 1837, in seeming penitence, it adopted a rule requiring its committee to report the general appropriation bills

<sup>1</sup> Two very elaborate reports, by Senate committees, on this subject (1871 and 1872) are reprinted in full in G. P. Furber, *Precedents*, 282-316. The topic is summarized by Miss C. H. Kerr, *op. cit.*, 73 ff.

<sup>2</sup> *Senate Journal*, 2d sess., 4th Cong., II, 348.

<sup>3</sup> *Ibid.*, 1st sess., 14th Cong., 440; 632.

within thirty days after the opening of the session or give reasons for the failure so to do. Nevertheless, tardy action by the House continued to give such annoyance that fifteen years later the Senate sought to amend the Sixteenth Joint Rule, so as to provide that all general appropriation bills should 'be sent at least ten days before the end of the session.' When it was proposed to make the phrasing explicit — 'be sent to the Senate' — the sponsors for the proposed rule declared: 'We [the Senate] have certainly the power of originating appropriation bills, which are different from bills for raising revenue.'<sup>1</sup> But the House did not assent to the change. Nor did it mend its practice. In 1856 Toombs complained that the Senate was forced to 'appropriate the people's money at the dead hour of midnight instead of in the face of day,' and referred to a recent experience when an \$8,000,000 naval appropriation bill had been passed in the small hours of the morning of March 4 — a bill which in the Senate, because of pressure of time, had been read only by title.<sup>2</sup> Such experiences led to the introduction in the Senate of a resolution to instruct its Committee on Finance to 'prepare and report such of the general appropriation bills as they may deem expedient.'<sup>3</sup> The proposal was fully debated by some of the Senate's ablest members, and was agreed to.<sup>4</sup> Indeed, the Senate did prepare and pass two appropriation bills — for repairs of fortifications and for invalid pensions — but the House rather contemptuously laid these bills on the table, and proceeded to pass the bills prepared by its own committees, and sent these to the Senate, which accepted them without protest. In 1880 the House Committee on the Judiciary, to whom the question had been referred, sustained the Senate's right to originate all appropriation bills, but the views of the minority were vigorously presented, and the report was recommitted by the House.<sup>5</sup> Since that time the prescriptive right of the House to originate all general appropriation bills has not been seriously challenged.<sup>6</sup>

<sup>1</sup> July 15, 1852, *Cong. Globe*, 1787.

<sup>2</sup> Feb. 7, 1856.

<sup>3</sup> It was the intent to encourage a division of labor, the Finance Committee conferring with the Committee on Ways and Means as to which appropriation bills should be prepared by the House and which by the Senate, with arrangement for an exchange of bills in the middle of the session.

<sup>4</sup> *Cong. Globe*, 375-81.

<sup>5</sup> This report of Feb. 2, 1881 (3d sess., 46th Cong., S. Rept. 147), and the views of the minority, printed in full in Furber's *Precedents*, 296-310, discuss this entire question, with elaborate citations. The report laid especial emphasis upon the answer by the Supreme Court of Massachusetts, when practically the same question was involved. 126 Mass. Rep., supplement, 557-602.

<sup>6</sup> Although the Senate may not 'originate,' it may simulate that process. Even as early as 1851 Senate committees began to consider bills before they had emerged from



Has this outcome in the long controversy meant for the House a 'victory which is an abdication'? Senator Hoar believed that to be the fact, and made an impressive demonstration of the truth in the paradox.

The whole power of legislation over that vast field which is covered by the Senate's amendments to the great appropriation bills is in practice delegated to two of the three members who are appointed on the conference committee. No other member gets a chance to discuss them, to vote separately on any one of them, to make any motion in relation to them. 'Gape, sinner, and swallow!'

... The rules and usages of the House leave that body much less practical power of deliberation or amendment in regard to all these provisions which have their origin in the Senate than the House of Lords has in relation to money bills under the English government.

When, therefore, the large States accepted the clause in question ('All bills for raising revenue shall originate in the House of Representatives') as a partial equivalent for the equality of the small States in the Senate, they accepted a further limitation of their own power. When the House, in 1832, refused to permit Mr. Clay's compromise bill to have its origin in the Senate; when, in 1856, it refused to permit the Senate to originate some of the general appropriation bills; and when, in 1870, it refused to permit the Senate to add a revision of the whole tariff to a bill abolishing the duties on tea and coffee, its victory was an abdication of its equality in legislation with the Senate and tended to deprive every one of its members of his right to debate or amendment in regard to a large part of the most important legislation of the country.<sup>1</sup>

In the list of eleven standing committees instituted by the Senate's resolution of 1816, the Committee on Finance was preceded only by the Committee on Foreign Relations. For some seventy years this committee handled proposals both for raising and for spending money. In the first two Congresses the general appropriations were made in

the House, and that practice has not been unusual. Indeed, in the Senate amendments have been offered to appropriation bills before they have been received from the House. Miss C. H. Kerr, *op. cit.*, 74, n. 3.

Lodge commented on the Senate's concession thus: 'The Senate has, without serious resistance, conceded to the House the sole right to originate the great appropriation bills, although its own right to originate such measures is the same as that of the lower branch. That this is a wise practice I think few persons will doubt, but it certainly does not show on the part of the Senate a desire to usurp authority.' H. C. Lodge, 'The Senate of the United States,' in *A Frontier Town*, 84.

<sup>1</sup> *North American Review* (Feb., 1879), 119 ff., 'The Conduct of Business in Congress.' At the time of writing this notable article, Mr. Hoar, after brief service in the House, had for two years been a member of the Senate. He could therefore speak from intimate knowledge of the practice in both branches of Congress. It is to be noted that in the years since this article appeared complaint has usually been as to the tardiness of the Senate — not of the House, as in the earlier period (*supra*, 455) — in delaying action upon the great financial bills, so that many of them are sent to conference committee for its hectic bargaining only in the last days of the session.

one bill, but in 1794 separate appropriation was made for the Army and soon thereafter for the Navy. By 1837 there were four general appropriation bills; Civil and Diplomatic, Army, Navy, and Indian. In 1867, ostensibly by division of labor to relieve the burden upon the Committee on Finance, but probably — as in the House — in part to ensure better party control, the field of financial legislation was divided, the Committee on Finance retaining consideration of proposals as to the raising of revenue, while bills for spending were referred to the newly created Committee on Appropriations, a committee of seven members for which Senator Anthony was sponsor.<sup>1</sup>

By 1914 the general appropriation bills had increased to fourteen.<sup>2</sup> Following the example of the House, the Senate had carried forward the decentralization of financial control, which had begun with the splitting-off of the Committee on Appropriations from the Committee on Finance until eight of the general appropriation bills were no longer referred to the Committee on Appropriations but to the legislative committees dealing with the services indicated.<sup>3</sup> It is not to be denied that there was some logic in assigning the consideration of supply bills to committees especially conversant with the particular services to be financed.<sup>4</sup> But the inevitable result was the prevention of study of the national financial problem as a whole, the loss of all unified responsibility for national spending, and the encouragement of reckless expenditures.

The agitation which after many years culminated in the passage of the Budget Act of 1921 made clear the need for radical change.<sup>5</sup> In the House the main feature in the procedural adjustment to the new law's requirements was in the giving to the Appropriations Committee, enlarged from twenty-one to thirty-five members, juris-

<sup>1</sup> March 6, 1867.

<sup>2</sup> Agricultural; Diplomatic and Consular; District of Columbia; Fortifications; General Deficiency; Indian; Invalid and other Pensions; Legislative, Executive and Judicial; Military Academy; Naval; Post Office; Rivers and Harbors; Sundry Civil.

<sup>3</sup> The Rivers and Harbors Bill to the Committee on Agriculture and Forestry; the Army and Military Academy Bills to the Committee on Military Affairs; the Indian Bill to the Committee on Indian Affairs; the Naval Bill to the Committee on Naval Affairs; the Pension Bill to the Committee on Pensions, and the Post Office Bill to the Committee on Post Offices and Post Roads.

<sup>4</sup> Writing in 1896, L. G. McConachie (*op. cit.*, 323) predicted that, following House precedent, the Senate would decentralize its committee control, but noted approvingly a feature of the Senate committee as then organized — 'the plan of having one representative from each of the Senate's thirteen more important committees for general legislation a member of the Appropriations. Any "plan" for such representation had to yield to the exigent demands of geography and of the "seniority rule."'

<sup>5</sup> See S. Res. 213, and Warren's speech, Jan. 18, 1922, *Cong. Rec.*, 1319-26.

diction over all general appropriation bills, the framing of which therefore had been distributed among eight different committees.<sup>1</sup> In the Senate vigorous opposition was made to the centralization of such great power in one Committee on Appropriations. In part this was voiced by Senators serving on legislative committees, whose influence over certain expenditures would be lessened. But the objection was also urged that centralization as already put in practice in the House had not proved so great a success 'as to lead us to swallow it whole.' Said Senator Moses:

We are now considering the Post Office appropriation bill, which, so far as most of its items are concerned, might just as well have been a piece of blank paper, sent over here from the House through the Committee on Appropriations of that body. It was first drawn by a sub-committee of the Appropriations Committee of the House, no one of whom ever served on the Committee on Post Offices and Post Roads, or knew anything about the technique of the service, so that we have been compelled to take that bill from its enacting clause and go through it stage by stage and practically to rewrite it.<sup>2</sup>

Some of the ablest and most experienced Senators of both parties — Lodge, Warren, Underwood — insisted that a sane budgetary system could not be made effective without materially increasing the Appropriation Committee's control over all general appropriation bills. But to make possible the securing of technical advice and to promote consistency between the appropriation bills and other legislation relating to the several branches of government service, the change in the Senate rules, instead of enlarging the existing Committee on Appropriations, kept that committee at its former membership of sixteen, and provided for a series of subcommittees 'to include *ad hoc* members recruited from the legislative committees.'<sup>3</sup> For example, when the Agricultural Appropriation Bill is to be considered, three members of the legislative Committee on Agriculture and Forestry, chosen by that committee, act with the Appropriations Committee; and in case the bill is sent to conference, one member of the Committee on Agriculture and Forestry shall serve in that conference as one of

<sup>1</sup> Amendment of House Rules, June 1, 1920. For comment on the 'triumph effected for the cause of efficiency and economy in government by the adoption of the budget system' and by placing the authority to originate appropriations in the House of Representatives in the hands of a single committee, see W. F. Willoughby, *Principles of Legislative Organization and Administration*, 508.

<sup>2</sup> Moses, March 1, 1922, *Cong. Rec.*, 3203.

<sup>3</sup> Lindsay Rogers, *American Political Science Review* (Feb. 1924), 84-86. By 1932 the committee's membership had been increased to twenty-three.



the managers on the part of the Senate.<sup>1</sup> The elaborate amendment of the Senate Rule, March 6, 1922, prescribes this same arrangement as to service of three *ad hoc* members with the Appropriations Committee and one *ad hoc* member if the bill goes to conference, in the case of each of the seven other legislative committees which till 1922 had prepared eight of the general appropriation bills.

In connection with this reorganization, the new rule introduced another change which materially curtailed the committee's powers. It provided:

The Committee on Appropriations shall not report an appropriation bill containing amendments proposing new or general legislation, and if an appropriation bill is reported containing amendments proposing new or general legislation, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations.<sup>2</sup>

By making the entire bill, and not merely the offending item, suffer the penalty, it was hoped that the Appropriations Committee would be dissuaded, not only from encroaching on the prerogatives of the legislative committees,<sup>3</sup> but from stultifying itself by adding to a House bill amendments of such a nature that the new House rule would prohibit their acceptance, 'unless specific authority to agree to such amendment shall be first given by a separate vote on every such amendment.'<sup>4</sup>

#### WHY AND HOW SENATE AMENDMENTS INCREASE APPROPRIATIONS

In general, until well into the present century, the pronounced tendency was for Senate amendments greatly to increase the amounts carried by general appropriation bills as passed by the House. Frankly acknowledging this almost universal tendency, Allison, for years chairman of the Senate Appropriations Committee, declared that in considerable degree this increase covered necessary appropriations to which the United States was pledged, but which the House had

<sup>1</sup> Moses declared: 'The practical result of that proceeding will be that three rank outsiders will be educating the sixteen regular members of the Committee on Appropriations. (*Cong. Rec.*, 3203.) The changes made March 6, 1922, are incorporated in Rule XVI.

<sup>2</sup> Rule XVI, sec. 1, par. 2. G. R. Brown, *The Leadership of Congress*, 235 ff., comments at length upon these changes in the House and Senate rules as to handling appropriation bills.

<sup>3</sup> Lindsay Rogers, *op. cit.*

<sup>4</sup> House Rule XX, cl. 2. *Manual*, 1923, sec. 810.

neglected to provide.<sup>1</sup> John Sherman, who in the old days had seen the situation from the standpoint of Secretary of the Treasury as well as from that of a Senator, stated that heads of departments, in order to appear economical, made a practice of underestimating expenditures, and then would come before the Senate committees to have these items inserted.<sup>2</sup> It is also a frankly recognized fact that House members, posing as champions of economy, have often voted for lower appropriations than they believed should be made, assured that the Senate would make good the deficiency in the bill and thereby shoulder an undeserved odium for 'extravagance.'

But the major part of this proverbial increase was due not to Representatives' negligence nor to their desire to get credit as 'watch-dogs of the Treasury,' but to the temptation which every Senator feels and to which many a Senator succumbs, to strengthen his political control in his own state in the easiest and most effective way. Public buildings, reclamation projects, adjustments of claims, make the Senator 'solid' with thousands of constituents without involving any drain upon his own pocketbook. The habit of exchanging favors in the confirmation of appointments makes a similar observance of 'senatorial courtesy' natural in this other form of favor-giving; and log-rolling — which President Lowell has called the great danger of democratic government<sup>3</sup> — reaches its acme in the understandings as to appropriations which are reached in such a body as the United States Senate.<sup>4</sup> Furthermore, the Senate's scheme of representation gives to the Senators from the small states tremendous power in extorting costly favors, if they will but band together — a fact of which so-called 'Farm Blocs' from time to time have shown themselves fully aware. Their long term of service enables them in conference committee to wear away the opposition of House managers.<sup>5</sup> Says Professor Albert Bushnell Hart:

<sup>1</sup> March 31, 1885, *Cong. Rec.*, 94.

<sup>2</sup> Miss C. H. Kerr, *op. cit.*, 75-76.

<sup>3</sup> F. W. Taussig, *op. cit.*, 374.

<sup>4</sup> Vice-President Marshall declared: 'As I watched the appropriations during eight years in the United States Senate, I concluded that that cause was utterly foolish which came down asking less than half a million dollars. Small items are scrutinized with a microscope and large ones are taken as a matter of fact.' ('Genial Memories,' in *Boston Herald*, Sept. 29, 1925.) He instanced the case of a roustabout, employed by the United States. While at work on his job, he was struck in the mouth by a crane. Over his claim for \$17.50 for repair of his broken set of false teeth the Senate, so Marshall said, wrangled for three hours. To the next item of \$250,000, of somewhat doubtful merit, nobody raised a protest.

<sup>5</sup> 'Every other year the House votes on the appropriation bill with the knowledge that if they do not agree to amendments on which the Senate insists, and the bill fail, its power over the subject must be lost altogether by the arriving of the fourth

The clearer the conference reports on appropriation bills, the plainer is the fact that the House conferees habitually yield to the Senate. . . . So far as the House of Representatives is concerned, conferences are what plebiscites in France have been defined to be — 'a device for voting Yes.'<sup>1</sup>

The rules of the Senate — permitting unlimited debate and in consequence often making easy an absolute hold-up of legislation except by unanimous consent — enable a small group or even a single Senator to make preposterous demands as the price for allowing appropriations most essential for the public service to be voted.<sup>2</sup> For example, in 1897 the Urgent Deficiency Bill came back from the Senate with from eighty to ninety pages of amendments. The House conferees could not secure a meeting with the Senate conferees until 3 P.M. on the third of March. They remained in session throughout the night. Not until two hours before the expiration of the Congress could Chairman Cannon report that the conference had been unable to agree:

We found that if we were to get the money, by way of deficiency, to carry on the government for the balance of this fiscal year, we must concede in the conference report, as the price therefor, these eighty or ninety pages of claims put on by the Senate, and, in the main, not proper, not well founded. . . . Let me say that these items of claims are here in defiance of the rules of both House and Senate.

(Northway, another House conferee): We cannot attach any of these claims to an appropriation bill because they will go out upon a point of order, but they can be attached in the Senate. . . . Your conferees thought that they ought not to submit to that. We said so plainly, and we say so to the House. . . . The claims amount to more than \$2,000,000.<sup>3</sup>

That Congress expired with no agreement reached.

Exactly six years later, Cannon — already designated as the Republican majority's choice for Speaker in the next Congress — at half after three on the morning of the fourth of March presented the

of March, when its life expires, and that the new bill must be dealt with by its successors.' G. F. Hoar, *North American Review*, cxxviii, 118.

<sup>1</sup> 'The Biography of a River and Harbor Bill' (1887), *Practical Essays in American Government*, 222. Note material improvements in procedure, *infra*, 464 and 469.

<sup>2</sup> Down to the middle of the past century, the Senate frequently complained that the House delayed action upon appropriation bills with the result that the Senate had to vote upon them under duress, with no time for proper consideration. In recent years the situation has been reversed. 'It has been the custom of Congress at the end of a session to bring in a deficiency bill, send it over to the Senate, and there it is loaded up with ancient amendments. . . . And then it is brought back here, and we are told that if we do not agree to this deficiency at once, we can not take a recess or can not adjourn. Congress has been held up a number of times in that way.' Representative Garner, June 30, 1922, *Cong. Rec.*, 9773.

<sup>3</sup> March 3, 1897, *Cong. Rec.*, 2980-81.



conference report on the General Deficiency Bill. He explained that the delay had been caused by disagreement over a single Senate amendment, to pay to the State of South Carolina \$47,000 upon a claim which the Government's auditing officers, in compliance with the existing law under which other claims had been settled, had found entitled that state to receive the sum of thirty-four cents.

Your conferees had the alternative of submitting to legislative blackmail at the demand, in my opinion, of one individual — I shall not say where — or of letting these great money bills fail. Now, what are we going to do about it? This bill contains many important matters — your appropriations for public buildings, legislation lately had along the line of the public service to the extent of \$20,000,000. . . .

Gentlemen, I have made my protest. I do it in sorrow and in humiliation, but there it is; and, in my opinion, another body under these methods must change its methods of procedure, . . . else this body, close to the people, shall become a mere tender, a mere bender of the pregnant hinges of the knee, to submit to what any one member of another body may demand of this body as a price for legislation.<sup>1</sup>

The conference agreement was accepted; the price was paid. 'But, late as the hour was, the weary members were fired by his utterances until the great hall resounded with their shouts.'<sup>2</sup> The next day, when the Senate of the new Congress was convened, Cannon's speech at once was the subject of severe condemnation. Hale declared that he had read it 'with the greatest amazement and sorrow'; Allison condemned its intemperate language and its disregard for House rules as to criticism of another branch of Congress; Teller declared his remarks 'inappropriate and out of place.' Tillman, who had forced South Carolina's claim, asserted its validity. 'Speaking metaphorically,' he then gave his version of the episode:

The watchdog of the Treasury — tired out, weary, sleepless for hours — came in and shut his massive jaws down on this claim, and said, 'Whenever you all get ready to rub that out, we will agree. . . .' Then what was I to do? I simply shut my jaws down on the proposition that I would have that money or I would have an extra session; and I was in position under the rules of the Senate to enforce it, thank God!<sup>3</sup>

In the closing half-hour of a Congress, June 7, 1924, when the conference report upon the Second Deficiency Bill was presented, in

<sup>1</sup> March 4, 1903, *Cong. Rec.*, 3058. The House agreed to this conference report by a vote of 170 to 18.

<sup>2</sup> Dispatch to *Boston Herald*, March 4, 1903.

<sup>3</sup> March 5, 1903, *Cong. Rec.*, 2-12. Of course Tillman was not present in the conference.

which the Senate conferees had receded from an amendment carrying \$200,000 for the Spanish Springs Reservoir in Nevada, Pittman of that state declared:

That kind of thing will not go. You cannot legislate in that way. You had better find out that you cannot have legislation by commission in this body. I have said that once before. I had to kill a naval bill at the last session, and it becomes my unfortunate lot now, for purposes of making committees do their duty, to kill this bill. I hate to kill it. . . . This report shall not be voted on in any way until that amendment is included.<sup>1</sup>

Unyielding to pleas from members of both parties, he made good his threat, and the bill, carrying some \$15,000,000 for many imperatively needed public services, was killed because Senate conferees had failed to insist upon one \$200,000 appropriation for an irrigation project in Nevada.

#### RESTRAINTS UPON THE SENATE'S AMENDING APPROPRIATION BILLS

By its own rules the Senate has subjected itself to restraints — more impressive in phrase than in practice — upon its exercise of the power to amend. Of long standing is the rule:

No amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act, or resolution previously passed by the Senate during that session; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with law.<sup>2</sup>

What is general legislation on a general appropriation bill? The compiler of the Senate's *Precedents* declared that during the consideration of appropriation bills and amendments thereto no subject is more widely discussed in the Senate than this.<sup>3</sup> In the Senate's

<sup>1</sup> *Cong. Rec.*, 11199; 11202. Two years later, in the closing half-hour of Congress, Cameron of Arizona got the floor and talked the session out, declaring: 'If I cannot get an agreement of the Senate to take up the bill [Veeder River Irrigation Project, S. 3342] on the first day of the coming session, I will use up the time, because I must do so.' (*Ibid.*, 12794, July 3, 1926.) By what compulsion must he!

<sup>2</sup> Rule XVI, sec. 1. Until the amendment of the Rules in March, 1922, the final phrase of this section read: . . . 'in pursuance of an estimate of the head of some one of the departments.'

<sup>3</sup> Of the nearly 1000 pages devoted to setting forth *Precedents of the United States Senate*, the compiler, Henry H. Gilfry, has devoted more than one-fifth to 'Amendments to General Appropriation Bills.'

daily practice every phrase in the foregoing rule has been subjected to strain. Hair-splitting decisions have been made and reversed, depending upon party or personal advantage sought, or even upon accident. For example, July 31, 1909, when a member offered an amendment to a pending appropriation bill in the form of a proviso as to the manner in which the money should be spent, Hale made the point of order that it was 'legislation,' and Vice-President Sherman ruled: 'It is clearly so. The Chair sustains the point of order.' But within an hour when the point of order against legislation was again raised, it was withdrawn.<sup>1</sup>

It is required that all amendments to general appropriation bills moved by direction of a Senate committee, proposing to increase an appropriation already contained in the bill, or to add new items of appropriation, shall be referred to the Committee on Appropriations at least one day before they are considered.<sup>2</sup>

#### SENATE 'RIDERS' ON APPROPRIATION BILLS

'The Senate may actually couch extraneous matter under that name — "amendment."'<sup>3</sup> Not a session of Congress passes in which the Senate does not demonstrate anew and often Madison's cautious forecast in the Federal Convention's debate over the Senate's power to amend bills for raising revenue. Yet hardly any other Senate rule is so drastic as that against 'riders':

No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject-matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any amendment to a general appropriation bill may be laid on the table without prejudice to the bill.<sup>4</sup>

Often the rule is blandly ignored. Frequent rulings emphasize how

<sup>1</sup> *Cong. Rec.*, 4680; 4686. Consistency here yielded to economy.

<sup>2</sup> Rule XVI, sec. 2. The rule further provides: 'When such an amendment has actually been proposed to the bill, no amendment shall be received proposing to increase its amount; amendments proposing new items to river and harbor bills, and amendments to bills establishing post roads or proposing new post roads shall be referred to the Committee on Commerce and to the Committee on Post Office and Post Roads, respectively.' To curb the claims nuisance, it is provided that no amendment, the object of which is to pay a private claim, shall be received to any general appropriation bill, unless it is to carry out the provision of an existing law or a treaty stipulation, which shall be cited on the face of the amendment. (Sec. 5.)

<sup>3</sup> Madison, *Debates*, 391, Aug. 13.

<sup>4</sup> Rule XVI, sec. 4.



few are the bills to which there is applied any limitation whatever as to the nature of the amendments that may be added thereto.<sup>1</sup>

In 1849 Vice-President Dallas ruled that it was in order to add to the pending Army Appropriation Bill an amendment providing that 'the inhabitants of the Territories of New Mexico and California, respectively, shall be entitled to the benefits of the writ of habeas corpus' in various specified cases.<sup>2</sup> The Senate itself, by a vote of 32 to 6, sustained the Chair's ruling that it was in order to amend a private pension bill, 'for the relief of Thomas Bronaugh,' by adding a section for the repeal of 'An act to aid the Territory of Minnesota in the construction of a railroad therein.'<sup>3</sup> Lord Bryce noted that in the middle of the past century the Senate tried to coerce the House 'by tacking a pro-slavery proviso to an appropriation bill which it was returning to the House; a few years later (1855 and 1856) the House used the same device against the Senate, and in 1867 both Houses revived the practice against President Johnson by attaching to an Army Appropriation Bill a clause which virtually deprived the President of the command of the Army. Sure that a veto would be overridden, the President yielded.'<sup>4</sup>

Despite the present drastic rule against receiving ungermane amendments or amendments proposing general legislation on a general appropriation bill, resort is often made to that expedient. During the three Congresses from 1916 to 1921 thirteen of the general appropriation bills were made the vehicles for more than forty different riders. The favorites for this use were the Post Office, the Agricultural, and the Naval Appropriation Bills, each of which during that period carried five riders.<sup>5</sup>

<sup>1</sup> The list of general appropriation bills has grown from one to fourteen. Gilfry, *Senate Precedents*, I, 58.

Thus, President *pro tempore* Gallinger ruled: 'An omnibus public building bill not being a general appropriation bill, the question as to whether an amendment is germane or not does not apply; nor is there any inhibition against a private claim being attached to any bill except an appropriation bill.' (Feb. 20, 1913, *Cong. Rec.*, 4063.)

Vice-President Marshall overruled a point of order, declaring that the question whether an amendment is germane to the original proposition 'only applies to [general] appropriation bills and nothing else in the Senate of the United States.' (Feb. 8, 1915, *Cong. Rec.*, 3332.)

It has been repeatedly held that a bill which, as a separate measure, may be passed by a majority vote, 'shall not, when moved as an amendment, be ruled out of order for incongruity, inconsistency, or on account of not being germane.' (Gilfry, *Senate Precedents*, I, 43-44.)

<sup>2</sup> March 1, 1849, *Cong. Globe*, 629.

<sup>3</sup> Aug. 3, 1854, *ibid.*, 2172-78.

<sup>4</sup> James Bryce, *The American Commonwealth* (1896 ed.), I, 188.

<sup>5</sup> Memorandum by Charles C. Tansill, Library of Congress, Legislative Reference

It has been said that riders are attached to a bill either to enable some pet plan of little or no merit to ride to its passage on the shoulders of a stronger bill, since the President's veto is not selective; or to make possible the passing of a bill which otherwise would get no opportunity for a vote in the hurry of the end of the session; or to overload the bill with amendments, and so defeat its passage or force a veto by the absurdity or viciousness of the riders.

Recent Congresses have afforded many illustrations of incongruity between the bill which served as the vehicle and the load which it has been made to carry. In 1913 the Sundry Civil Bill was saddled with an amendment that no money appropriated in that bill to enforce the Sherman Anti-Trust Law should be used to prosecute farmers' societies or labor unions. In 1918 'Wartime Prohibition' was enacted as a Senate rider upon the Agricultural Appropriation Bill.

A notable instance of using riders to kill a measure is found in the history of the resolution for granting to Liberia a loan of \$5,000,000. This project was non-partisan; it had been approved by Presidents Wilson and Harding, and Secretary Hughes gave it somewhat hesitating advocacy. The loan was said to have been pledged to Liberia, if she would declare war upon Germany and comply with certain other conditions. Liberia did declare war, to the advantage of the Allies, but she never complied with the other conditions said to have been specified when the pledge of the loan was made. The resolution for the granting of the loan passed the House, but in the Senate encountered opposition from those who believed that there was no legal nor moral obligation to grant the loan. After long debate, two riders were tacked to it: a Borah amendment, providing for an appropriation of \$20,000,000 for reclamation work in the Far West;<sup>1</sup> and a Harrison amendment involving an appropriation of \$170,000 to enable the Interstate Commerce Commission to employ some thirty-five additional locomotive boiler inspectors.<sup>2</sup> In advocating his amendment Borah said: 'I would rather give them the money outright than to get messed up in African affairs which will cost us many millions to get away from.' No sooner was this amendment adopted

Service, April 25, 1924, 'Riders on Appropriation Bills.' He lists 42 riders, but intimates that more might be cited.

In May, 1933, there were delegated to the President terrific powers over the country's monetary system by the Thomas amendment to the Agricultural Adjustment Bill (p. 1086).

<sup>1</sup> Sept. 11, 1922, *Cong. Rec.*, 12340. Passed by a vote of 26 to 23.

<sup>2</sup> Sept. 12, 1922; Nov. 23, 1922. Agreed to by a vote of 51 to 9. Among those voting for this amendment were Brandegee, Lodge, Pepper, Curtis, and Smoot.

than Ashurst offered an amendment to strike out the body of the original Liberia loan resolution and 'leave as the body and substance of the measure the [Borah] amendment just adopted,' but this 'major operation' was defeated by a narrow vote. The Mississippi Senator charged that the real motive of the resolution was not so much to reward the Negro Republic in Africa as to curry favor with the Negro voters in the United States, but his amendment as to 'boiler inspectors' was adopted by a vote of almost six to one, being approved by many of the most influential Republican leaders in the Senate. Loaded down with this incongruous freight, the Liberian Loan resolution was recommitted to the Committee on Finance, and thus it was smothered.<sup>1</sup>

To the Postal Salary Increase Bill, a Senate measure, Borah proposed an amendment calling for complete publicity of campaign contributions by persons or organizations with the purpose of helping to elect or to defeat any candidate for federal office.<sup>2</sup> The Senator in charge of the bill mildly protested,<sup>3</sup> but the end of the session was close at hand, and the time seemed too short to secure legislation as to campaign publicity in any other way. The amendment was adopted by unanimous vote in the Senate and, after conference, the House acceded to it; but the bill was vetoed by the President.<sup>4</sup> The following year the Postal Pay and Rate Increase Bill was made the vehicle for the Walsh (Massachusetts) corrupt practices amendment, limiting the amount of expenditures in senatorial and congressional campaigns, and providing for periodic reports by all election committees, congressional, state, and national, concerned with such campaigns.<sup>5</sup>

<sup>1</sup> 'Liberia mourned, while a few Senators wept. Others, with a touchy sense of humor, laughed.' (Whiting, in *Boston Herald*, Feb. 4, 1925.) The resolution was re-committed November 27, 1922, *Cong. Rec.*, 287-88.

<sup>2</sup> May 26, 1924, *ibid.*, debate, 9506-15. Amendment to S. 1898.

<sup>3</sup> Edge: The addition of the proposed amendment would put the conferees of the two Houses in the position of considering the very involved subject of corrupt practices as well as the meritorious increases in the salaries of post-office employees.

<sup>4</sup> *Ibid.*, 11127. The President declared: 'If that provision stood alone, I should approve of that part of the bill relating to campaign funds.'

<sup>5</sup> For the history of this bill, see pp. 159-60. This Walsh amendment was acceded to by the House, after conference, and became 'Title III' of the new Act. The several divisions of this incongruous piece of legislation are named thus:

Title I. Reclassification of Salaries of Postal Employees.

Title II. Postal Rates.

Title III. Federal Corrupt Practices Act, 1925.

To the Soldiers' 'Bonus' Bill which passed the House March 23, 1932, the Senate added two riders: (1) an amendment providing that the cost of the bonus be met from interest received from foreign governments on their war debts to the United States, and (2) an amendment providing for the reclamation of swamp lands to create home-



## FILIBUSTERING ON SUPPLY BILLS

When the Seventy-First Congress convened for the short session in December, 1930, the 'coalitionists' held the balance of power, and it seemed likely that they would attempt by filibustering to prevent the passing of the eleven appropriation bills and thus force the calling of a special session, unless their favorite measures were brought to a vote. Accordingly, before the Christmas recess it was announced by leaders who had been in conference with the President that if the supply bills were still being obstructed by the first of February, he would urge the adoption at that time of a 'continuing resolution,' which would continue into the next fiscal year the appropriations of the current year, until Congress should make further provision for the various services of the Government.<sup>1</sup> The object, of course, was to make futile any filibustering on appropriation bills in the closing weeks of the session by getting an immediate assurance from Congress that supplies for carrying on government services would be continuously provided. This step did not become necessary at that time; but before Congress reconvened there came from the White House further intimation that the President was resolved not to call a special session, and that in case filibustering on supply bills were attempted, he would issue a statement to the country in protest against such tactics.

To some extent, by abolishing the short session of rigidly limited term the ratification of the 'Lame Duck' Amendment has eliminated filibustering on supply bills, and discouraged loading them down with ungermane riders.

In recent years progress in curbing irresponsible extravagance in appropriations has come about mainly on the initiative of the House, and has resulted in its actually gaining the dominant influence in the enactment of the 'spending' bills. In particular, the Senate's chronic practice of increasing appropriations by its amendments to House bills has been quite effectively checked by a House rule of 1920 forbidding its conferees, unless specifically authorized by special vote, to agree to any Senate amendment that would have violated the House rule, had it been offered in the House. As the House rule thus controlling is very strict, the Senate is no longer able to force ap-

steads for veterans, at an estimated cost of \$35,000,000. Both of these riders were knocked off in conference; and the bill was vetoed because no provision had been made for meeting the costs which it would entail. For further considerations of appropriation bills in conference committees, see pp. 457, 460 ff.

<sup>1</sup> See press reports of Dec. 21, 1930. Congress had adjourned for the holidays that morning.

appropriations that do not commend themselves to the House.<sup>1</sup> Congressman Robert Luce insists that 'there is no longer any "pork barrel,"' and that 'there has been none for years.'<sup>2</sup> In the matter of public buildings he declares that Congress has often been 'short-sighted and miserly.'<sup>3</sup>

<sup>1</sup> Robert Luce, *Congress*, 85. House Rule XX, cl. 2. P. DeW. Hasbrouck, in *Party Government in the House of Representatives*, 16, discusses the great increase in House control over appropriation bills after they have gone to the Senate, which the House has secured through this new rule.

<sup>2</sup> *Congress*, 82.

<sup>3</sup> The reader whose memory does not go back to typical 'pork-barrel' bills will find abundant illustrations of their costly absurdities in the debate on the River and Harbor Bill which passed the Senate May 29, 1916. In a speech of great length, Kenyon analyzed the bill, item by item, proving its indefensible wastefulness. Just before the final vote was taken, he declared: 'You are about to vote from the Treasury, in a time of great national stress and strain, at least \$20,000,000 in unjustifiable projects.' The bill was openly derided by Gore and Norris in the Senate (May 29, 1916, *Cong. Rec.*, 8841) and mercilessly criticized by Congressman Frear in the House (July 11, 1916, *ibid.*, 10823-25), but it passed by large majorities, for practically every state in the Union had 'pork' in it. See also, speeches of Cramton, Gillett, and Lenroot in criticism of the Public Buildings Bill which passed the House January 19, 1917.

Elsewhere attention has been directed to the increasing number and variety of financial relations which in recent years are being determined by treaties in the making of which the Senate may have a large share, while the House has none. Of especial interest are the instances in which resort has been made to the treaty (or 'executive agreement') procedure, at a time when the accomplishment of the same end by legislation was impossible (pp. 639 ff.).

Note reciprocal trade agreements, under Tariff Act of June 12, 1934.

# X

---

LEADERSHIP AND LOBBYING

---



---

★

Whenever the decision of the Caucus is made known, everyone, however high may be his position, however great his service, is bound by the common courtesies which prevail in these political bodies, to yield at once.

JOHN SHERMAN

I taught them all the politics they know, but not all the politics I know.

MATTHEW S. QUAY

We have about reached the point where it is generally recognized that lobbying is as inevitable and as indispensable a part of democracy as are political parties.

WALTER LIPPMANN

Wayne B. Wheeler, organizer and president of the Anti-Saloon League, sitting in the gallery and directing Senators and Representatives, coerced by the power of his organized political machine, how to vote, cannot fairly be called a lobbyist; and yet he has a powerful and direct influence over legislation. He touches men through their fear of re-election and not through their pocket-books. This is the fact, and it is the privilege of the public to decide for itself whether the old style or the new is the better, and whether either should be permitted to exist.

DAVID S. BARRY

If you find him not, . . . you shall nose him as you go into the lobby.

SHAKESPEARE

---

★

# X

---

## LEADERSHIP AND LOBBYING

---

### OFFICIAL LEADERSHIP IN THE SENATE

---

THE Constitution's provision that the Vice-President of the United States shall be the President of the Senate interposes an impassable barrier in the way of that officer's developing any such power of leadership — not to say of domination — as that which in the House naturally evolved into the 'czardom' of a Reed or the 'tyranny' of a Cannon. The very fact that the Vice-President is imposed upon the Senate from without incites jealousy of any attempt at direction by him — witness the Senate's reaction to assertiveness on the part of Vice-Presidents from Adams to Dawes. Moreover, during a considerable part of our history, the chances of politics have brought to the Chair in the Senate a presiding officer of the party which did not have a majority in that body — a situation which under ordinary conditions cannot develop in the House.

In the President *pro tempore*, on the other hand, the Senators have an officer of their own choosing and representative of their majority. The election of a Senator to this office is a recognition, not merely of his effectiveness as a presiding officer, but of his possession of other qualities of leadership as evidenced by his important committee assignments. He serves at the pleasure of the Senate, and may thus be made responsive to its will. But the fact that he presides only when whim or personal convenience or policy may lead the Vice-President to absent himself from the Chair gives to the office of President *pro tempore* a casual character fatal to the growth of a tradition of leadership. Only in case of the Vice-President's per-

manent removal by death or by his assuming the duties of President of the United States is scope given for the President *pro tempore* to exercise powers at all comparable with those of the Speaker. The Senate rules and procedural precedents, intended to guide and restrain the 'alien President,' cannot be relaxed or reversed when the occupant of the Chair chances to be a man of the Senate's own membership and choice.

## PARTY LEADERSHIP

---

### CAUCUS OR CONFERENCE

The actual organization of the Senate presents an anomaly hardly glimpsed by the Federal Convention's members, whose intent was to curb the influence of party or 'faction' by the phrases of a rigid Constitution. But it soon became the fact that party assumed control.

Each party in the Senate finds its real, its permanent, its effective organization in its caucus, and follows the leadership, in all important political battles, of the chairman of that caucus, its organization and its leadership alike resting upon arrangements quite outside of the Constitution, for which there is no better and no other sanction than human nature.<sup>1</sup>

The caucus, as an extra-legal party organization, had played its part in pre-Revolutionary times, and found its way into Congress at the time of Hamilton's dominance. Maclay's record of the Senate in the First Congress contains many a reference to 'the Secretary's tools,' or his 'gladiators,' or 'crew.'

This is . . . perhaps the important day, when the question will be put on the assumption of the State debts. I suspect this from the rendezvousing of the crew of the Hamilton galley. It seems all hands are piped to quarters.<sup>2</sup>

It was patching, piecing, altering, and amending, and even originating new business. It was, however, only for Elsworth, King, or some of Hamilton's people to rise, and the thing was generally done.<sup>3</sup>

<sup>1</sup> Woodrow Wilson, *Constitutional Government in America*, 133.

<sup>2</sup> Maclay, *Journal*, March 7, 1790, 208; also, 227, 235, 275, 331.

<sup>3</sup> *Ibid.*, March 3, 1791, the last day of the First Congress.



As early as 1797 it was noted that

By a previous arrangement they have left out of the committees every one of the minority to shew them that they have no confidence in them and are afraid to trust them at this crisis.<sup>1</sup>

As Faunce's Hotel had been the Republican leaders' rendezvous during Adams's term, so during the Jefferson Administrations Gallatin's house became their meeting-place, and the Secretary of the Treasury left a record of at least two instances in which he personally intervened.

I found it necessary to interfere by speaking to the members of the Senate, and succeeded in having the government bill [for Michigan] postponed sine die, and the general principles of the land bill rejected.<sup>2</sup>

The evolution of the senatorial caucus as an organization for formulating and effectuating the party's will is a tempting field for research. Material for such a study is not easily accessible, for such party conclaves have been secret; only occasionally and in part have their conclusions been officially made known to the public.<sup>3</sup> The scope of the present study permits comment upon only a few of the more recent developments.

#### IS A SENATOR BOUND BY THE ACTION OF THE CAUCUS OF HIS PARTY?

In popular discussion and in press reports the terms 'caucus' and 'conference' are often used interchangeably.<sup>4</sup> As a matter of fact, Republican meetings held up to and including that of January 28, 1913, were termed 'caucuses' while all thereafter have been designated 'conferences.'<sup>5</sup> The Democratic organization has made no such change by formal resolution, but in recent years by common

<sup>1</sup> Quoted from 'South Carolina Federalists,' in *American Historical Review*, XIV, 789.

<sup>2</sup> Gallatin, *Writings*, 322, Nov. 25, 1806.

<sup>3</sup> From time to time the control of the Senate's action by the caucus has been shown in the putting forward of slates for the filling of Senate offices; the determining of the number and size of the standing committees and the proportional representation thereon to be allotted to the several parties; the making of the individual assignments to committee places, including the placing of 'insurgents,' and the promotion or demotion of committee chairmen. Party action upon controverted issues has often in reality been determined in advance by discussion and vote in caucus.

<sup>4</sup> Even in recent years press dispatches occasionally announce that a coming 'conference' will be a 'caucus,' as binding action will be taken upon a given subject.

<sup>5</sup> For information as to the party 'conferences,' their officers, committees, etc., the writer is indebted to letters, in reply to his inquiries, from Senator Frederick Hale (Feb. 28, 1928), then secretary of the Republican conference; and from Senator J. T. Robinson (Feb. 29, 1928), then minority leader.

consent the term 'Democratic Conference' has come to be employed.

In earlier years it was often a hotly debated question, to what extent a member's vote in the Senate should be controlled by previous action of a party 'consultation,' 'conference,' or 'caucus' in which he had taken part.

At the opening of the special session of Congress in 1867, it was proposed in the Republican caucus that the work of the session be confined to the enactment of legislation for the removal of obstacles in the way of the Reconstruction Acts already passed. Sumner earnestly opposed this proposal, and, when it was agreed to by the caucus, he at once gave notice that he would not be bound thereby. When the Republican leader introduced in the Senate a resolution to impose that limit upon the session's business, Sumner countered with a substitute resolution that the Senate proceed to the dispatch of the public business, without undertaking in advance to limit the action of Congress to any special subject. Fessenden severely criticized Sumner, insisting that it was highly improper for a Senator who had participated and voted in a 'consultation' to refuse to be bound by its vote when he found himself in the minority.<sup>1</sup> Sumner rejoined: 'I am a Senator of the United States.' As such, he insisted that it had been his duty to attend the caucus and oppose what he believed to be unwise action, and then on the floor of the Senate to withstand what he considered an unconstitutional limitation upon the public business. After vigorous debate, Sumner's resolution was defeated by a vote of more than four to one.<sup>2</sup>

In both branches of Congress the Democrats have shown more willingness than the Republicans to submit to caucus control.<sup>3</sup> For many years it was the rule of the Democratic senatorial caucus that a two-thirds vote in caucus was binding upon all Democratic Senators. Three years after the adoption of this rule, when the Democratic caucus in February, 1906, declared that all Democratic Senators must vote against ratifying the Santo Domingo Treaty, Patterson withdrew from the caucus, defied its authority, and in the Senate offered resolutions declaring the caucus action coercive and arbitrary,

<sup>1</sup> Fessenden: 'You may not go into a consultation — call it a caucus or what you will — where the implied obligation is that the question under consideration is to be settled by a majority, and not only debate but vote, and then, finding yourself in a minority, say, "I am not bound."'

<sup>2</sup> July 5, 1867, *Cong. Globe*, 481-98.

<sup>3</sup> P. G. Hasbrouck, *Party Government in the House of Representatives*, 32, citing Rule 2 of the Democratic caucus.

and its decision in contravention of the Constitution and in violation of the Senator's oath.<sup>1</sup>

Bailey vigorously dissented:

The Democratic caucus has simply and only defined his duty as a Democrat; and it is for him to determine how far his duty as a Senator requires him to disregard his duty as a Democrat. . . . Senators are and ought to be controlled by a devotion to certain principles, and they unite themselves with a given party because they believe that party best calculated to promote the growth, the permanence and the success of those principles. . . . They must consent to waive the immaterial or infrequent differences in order to promote the accomplishment of an important common end.<sup>2</sup>

In 1915, caucus domination again was hotly debated in the Senate during the debate upon the Ship-Purchase Bill. Hitchcock denounced attempts to bind Senators by vote in caucus, where the five-minute limit applied to speeches made it impossible in so short a time to get at the real merits of the question. In the Senate he offered a resolution:

That they [Senators] are required hereby, and under the Constitution, to vote in accordance with their own convictions and judgment, and they shall not subordinate them to the decree of secret party caucuses or other outside influences.

Reed (Missouri) made a vitriolic reply, condemning bolters.<sup>3</sup> Later in the same debate a number of Republicans, led by Root, took the more liberal view. Sounding the same note as had Sumner, Root declared:

Any agreement made beforehand, by which Senators of the United States bind themselves not to consider, not to keep an open mind to arguments that are made upon the merits of a measure, not to vote in accordance with their individual judgments, is a violation of their oaths, is an abandonment and a negation of the constitutional government of the United States, and is the substitution for it of an extra-constitutional and unconstitutional method of government.<sup>4</sup>

Other Republican leaders bore testimony that in their many years of service 'the Republican Party has never undertaken to bind its members on any question whatever.'<sup>5</sup>

A decade later the Republican conference was reported to have adopted a resolution declaring that no Senator attending a party conference would be bound by action there taken, but would be en-

<sup>1</sup> Feb. 5, 1906, *Cong. Rec.*, 2053-54.

<sup>2</sup> *Cong. Rec.*, 2212; 2217.

<sup>3</sup> *Ibid.*, 3331, Feb. 8, 1915; Owen, 3733; 3853.

<sup>4</sup> *Ibid.*, 3705, Feb. 13.

<sup>5</sup> Gallinger and Smoot, *ibid.*, 3733.



tirely free to act on any matter considered by the conference as his judgment might dictate.<sup>1</sup>

#### WHO MAY TAKE PART IN THE CONFERENCE?

Upon this point the individual Senator is often a law unto himself. In his controversy with Sumner, Fessenden said that the 'code' regulating the Senator's conduct as to the caucus must be 'of the mind and of the heart.' He declared that he had often absented himself from a conference, when its action was not likely to accord with his own judgment. Independents, like Borah, who always find the party harness galling, rarely attend the party conference, however bluntly they may make clear their views as to what action the party should take.

While the Republicans have professed and practiced a greater liberality than the Democrats in that for half a century they have not 'held caucuses to bind any Senator,' on the other hand they have been more exclusive as to who shall take part in the conference deliberations. This attitude may have been due to the greater inroads which factions and blocs have made upon their party.

Upon the eve of the second session of the Sixty-Seventh Congress, it became an anxious question, what attitude should be taken toward La Follette and the three nominally Republican Senators who had actively supported him in his campaign for the Presidency against the regular Republican nominee. With only two or three dissenting voices, a resolution was adopted that the four 'disloyal' Senators (La Follette, Ladd, Brookhart, and Frazier) 'be not invited to future conferences, and be not named to fill any Republican vacancies on Senate committees.'<sup>2</sup> This action was strongly opposed by some

<sup>1</sup> Press dispatches of March 12, 1925. See Robert Luce, *Legislative Procedure*, 513-15, for excellent discussion of the merits and defects of the binding caucus.

At the opening of the 73d Congress the Democrats adopted a drastic rule under which a majority of the caucus 'binds the entire Democratic membership to support an Executive proposition on final passage.' No action was taken to bar amendments. This was stated March 14, 1933, by Majority Leader Robinson, in relation to the Administration's 'Economy Bill.' The only excuses which a member might give for declining to be bound under this rule were that he had conscientious objections to a bill in question, or that it ran counter to pledges made to his constituents. In the spring of 1935 Democratic Senators in caucus bound themselves to favor a ten-months' extension of the N.R.A., notwithstanding the President's express wish for a two-year extension.

<sup>2</sup> Press dispatches of Nov. 28, 1924. For the effect upon their committee assignments, see p. 291. For the next two years Frazier's autobiographical sketch in the *Congressional Directory* contained the statement, 'Officially excluded from the Republican caucus, Nov. 28, 1924.'

In 1933 Reed (Penn.) advised that the bolting 'Republicans' who had supported

independent Senators, especially from Western States, who insisted that in the congressional campaigns two years later Republican votes would be sadly needed in the states where these four men, now to be ousted as 'renegades,' had been elected as Republicans. This prophecy was soon fulfilled. Within two years two of this group had died, and were succeeded by Republicans of their own complexion; another's term had expired, but he had been re-elected. With the fourth, whose term had continued through this period, there came about a *rapprochement*, for he needed support and 'patronage' to aid in his campaign, and the party desperately needed a 'Republican' Senator from North Dakota. Accordingly, December 14, 1926, Frazier was formally welcomed back into the Republican fold by the unanimous vote of the Republican Steering Committee, though its personnel was almost exactly the same as on the day of his ousting;<sup>1</sup> and on the same day the Republican conference gave him a Republican committee assignment.<sup>2</sup>

A few days prior to the opening of the first session of the Seventieth Congress, a written communication, signed by four 'Progressive Republicans' and one Farmer-Labor Senator, was sent to the officers of the Republican conference, setting forth the conditions upon which the signers would be willing to 'affiliate themselves in counsel and action with the Republicans' before the organization of the Senate. They professed not to be insistent upon a promise of attractive committee assignments, but they wished a pledge that within a specified time three measures in which they were vitally interested should be brought to open debate in the Senate, and that they should be carried to a final vote before the end of that session. The chairman of the Republican conference was authorized to confer with their representatives. Upon his assurance that a majority of the conference took the position that there should be 'no unnecessary delay' in securing a vote upon the three measures during the ensuing session, the Progressives issued a statement that they would 'assist in the organizing of the Senate, reserving our right to pursue an independent course of action upon questions which may arise during the session.'<sup>3</sup>

Roosevelt be expelled from the party rolls. This would have included Cutting, Johnson, La Follette, and Norris. No such action was taken. In 1934 Reed, himself, was defeated for re-election.

<sup>1</sup> Press dispatch of Dec. 14, 1926.

<sup>2</sup> Letter from secretary of Republican conference.

<sup>3</sup> Dec. 13, 1927, *Cong. Rec.*, 537-38.

## CONFERENCE FUNCTIONS AND PROCEDURE

*Organizing*

Under ordinary circumstances the most important meeting of the conference is held a few days prior to the convening of the Senate in a new Congress. Its program is given over to the tasks of organization. The party leader in the preceding Congress presides, unless he now chances to be a Senator-elect, in which case the call is issued and the lead taken by the party's senior member, in point of service. A first task — as in 1924 — is to determine who shall be entitled to take part in the conference. The conference then proceeds to the election of its officers. The proportion in which the parties shall be represented on the standing committees — often a matter of prior consultation between the majority and minority leaders — may be decided in full conference session, and provision is made for the choice — usually by the chairman — of the party's Committee on Committees, and the other committees of the conference.

*Conference Officers**Chairman of the Conference*

Each of the parties, in the act of electing the chairman of its conference, chooses its floor leader in the Senate Chamber. In the Republican conference this position, ostensibly of great power and responsibility, with rare exceptions has been filled 'under the seniority rule.' Thus, Gallinger was succeeded by Lodge, and at Lodge's death no one doubted that, if Warren wished to accept the position of majority leader, that honor and responsibility would without question go to him, despite the facts that he was in his eighty-first year and that, when the Republicans assumed control in the Senate in 1919, many progressives in the party had united in strong protest against his being made Chairman of the Appropriations Committee 'under the seniority rule.'<sup>1</sup> Upon Warren's announcement that he was not a candidate for the leadership, the election of Curtis followed immediately.<sup>2</sup>

<sup>1</sup> Page 300. In conversation with the writer, several Senators have declared that from such veteran 'leaders' as Gallinger, Lodge, and Warren little leadership of the party is expected. Actual leadership goes to the man best fitted by personality and experience to exercise it, or it is in commission among the chairmen of important committees. The veteran is made titular leader to save time in organization, and to avoid friction and jealousies.

<sup>2</sup> The leader is usually chairman of a major committee. In the previous Congress Curtis had been Vice-Chairman of the conference, whip, a member of the Committee on Committees and of the Steering Committee; in the Senate he was Chairman of the



In recent years the Democrats have shown greater willingness to choose as their leaders others than those of senior service in the Senate. Thus, in 1920, at the end of the few months of service by the veteran Martin, by unanimous vote the election went to Underwood, who had been but seven years in the Senate, and when he chose to retire from the leader's position in 1923, he was succeeded by Robinson instead of by one of the 'elder statesmen.'<sup>1</sup>

Rules and member of Finance and Appropriations Committees. In seniority Curtis was then outranked by Warren, Smoot, and Borah, but each of these three men preferred to retain the chairmanship of his own major committee (Appropriations, Finance, and Foreign Relations) than to assume the burden of floor leadership, for which Curtis's experience and personality better fitted him. When Curtis became Vice-President-elect, it was said that he wished to resign from the Senate early in December, in order that the vacancy thus created might be filled by the appointment of a man of his own wing of the party in Kansas. But at the request of President Coolidge he delayed his resignation until March 3, in order that throughout the short session the pending legislation might be carried forward under the effective leadership by which it had been directed in the long session.

<sup>1</sup> Underwood's retirement may have been due in part to his sensitiveness to criticism by some of his party colleagues that his acceptance of President Harding's appointment as a delegate to the Washington Conference was inconsistent with his position as minority leader. For his successor, the selection of Robinson, one of the younger and abler Senators from the Far South, was regarded as 'good politics,' likely to strengthen the party in a section where disaffection seemed to be growing.

Robinson had been minority leader for ten years before the Democrats gained control of the Senate in 1933. Though his previous record had been that of a typical conservative Southern Democrat, he now put forth all his energies in support, with rare and trifling exceptions, of the entire New Deal program. It has never been denied that at some time during President Roosevelt's first Administration Robinson was assured that he would receive the nomination for the first vacancy upon the Supreme Bench. Robinson's sudden death during the first days of vital debate on the President's plan for enlarging the Supreme Court was a heavy blow.

Within forty-eight hours of Robinson's death, the President's letter to 'My dear Alben' (Barkley, of Kentucky), pointedly addressing him as 'acting majority leader in the Senate,' widened the breach between Democrats. In the first place, its apparent purpose seemed to be to put forward Barkley as the President's choice for majority leader, and this was resented. In the second place, after declaring in this very letter that 'a decent respect for his [Robinson's] memory would have deferred discussion of political and legislative matters at least until his funeral services had been held,' he immediately told Barkley: 'I believe that it is the duty of Congress, and especially of the members of the majority party in the Senate and the House of Representatives to pass legislation at this session to carry out the objectives' of the President.

Despite the President's protestations of entire neutrality in the contest for the post of leader, the real issue was: 'Barkley and the President *vs.* Harrison and Friends.' A few days after the return from Arkansas of the funeral train on which nearly forty Senators had been incessantly discussing the fate of the President's Court Bill and the election of leader, the Democratic caucus by a majority of one vote (38 to 37) chose Barkley over the more experienced and tactful Harrison, whose leadership would have been more acceptable to the conservatives.

Regarded as a victory for the President's strategy, its early fruits were disappointing. At the hour of his death, Leader Robinson held in his hand a list of painfully acquired pledged votes which he had reason to believe assured the passage of the President's Court Bill, and the fulfilment of his own fondest hopes. But those personal pledges to himself lapsed with his death. Vice-President Garner, after many weeks of vacation fishing in Texas, returned to Washington on the funeral train, and convinced the President that his bill could not be forced through the Senate. When his pressure ceased, the

A man of forceful personality who is at once his party's conference chairman and floor leader may exercise great influence in both capacities. To him there is ordinarily entrusted the naming of members of the conference's several committees, subject to limitations imposed by the seniority rule and considerations of geographical representation. He is the representative of his party in negotiation with the spokesmen of minor groups, and also with the leader of the opposing party.<sup>1</sup> In the Seventieth Congress (1928) the majority and minority leaders occupied adjoining suites in the Senate Office Building, and in their neighborly get-togethers many important agreements may have been reached.<sup>2</sup> To both leaders are assigned additional clerks — to the minority leader one who is specifically designated as clerk of the minority conference. In the Senate Office Building spacious and magnificent majority and minority conference rooms are provided; but for less formal party consultations such as the exigencies of the day may require the majority members are wont to gather in the Marble Room. On the gallery floor is the minority conference room, where in frequent council the party's plans are determined. In special emergencies a recess of the Senate has been secured, to enable the minority conference to decide upon the strategy which the hour required.

The leaders, of course, serve only during the pleasure of the party conference by which they are chosen. Their right to lead may at any time be brought to a speedy test.<sup>3</sup>

Senate — only eight days after Robinson's death — by a majority of 70 to 20 voted to recommit the Court Bill.

<sup>1</sup> He may also seek to co-operate in team-play with the party leader in the House.

<sup>2</sup> It is a singular coincidence that each of these Senate leaders became his party's candidate for Vice-President in 1928.

<sup>3</sup> The issue was sharply forced in the session of Jan. 18, 1928. Heflin had been ranting for a long time, when his language was severely criticized by the Democratic leader, Robinson, who declared: 'I have heard him denounce the Catholic Church and the Pope of Rome and the cardinal and the bishop and the priest and the nun until I am sick and tired of it, as a Democrat.' Heflin: 'The Senator from Arkansas cannot remain leader of the Democrats and fight the Roman Catholics' battle every time the issue is raised in this body without some expression from a constitutional Democrat.' Robinson: 'I am going to call a conference tomorrow, and I challenge the Senator from Alabama to come before the conference and move the election of another leader for the Democratic Party in the Senate.' The conference was held. Heflin did not attend it, and later asserted that he had not understood that the question of choice of a new leader was to be brought up! By a vote of 33 to 1 Robinson's leadership was endorsed.

A few weeks after entering the Senate, Long (La.) made a sensational attack upon the minority leadership in the Senate, and resigned from all the committees to which he had been elected on nomination by the Democratic conference. (*Cong. Rec.*, 9214, April 29, 1932.) A few days later, he renewed the attack. (*Ibid.*, 10062.)

*Vice-Chairman and Assistant Leader*

The number and the functions of other officers of the conference depend in a measure upon the chairman's personality and strength. Thus, Lodge, in his seventieth year when chosen chairman and preoccupied with the burdens of the chairmanship of the Committee on Foreign Relations, assented to the choice of two assistants;<sup>1</sup> and in 1921 Curtis was made vice-chairman of the conference, with the status of assistant leader.

*The Whip*

Upon the whip devolves much of the routine work of party management. He labors with the waverers, warns of the approach of debate or votes upon important measures, and polls the Senate in advance of roll-calls.<sup>2</sup> Curtis, who had acquired valuable experience as whip in the House, was promptly assigned to that post on entering the Senate. The office of whip is at times combined with that of vice-chairman.

*Secretary*

The duties of this office are self-defining. It is frequently assigned to one of the younger and promising members of the conference.

## THE COMMITTEES OF THE PARTY CONFERENCES

As directly affecting the translating of party programs into legislation, the most important service is devolved upon the Steering Committee and the Committee on Committees. In both the Republican and the Democratic conferences the chairman is authorized to name these committees. Integration is closer in the Democratic organization, for by its rules the conference chairman is made Chairman of the Committee on Committees, which also serves as its Steering Committee.

*The Steering Committee, or Committee on Order of Business*

Each party's conference in full session by discussion and vote may seek to form its members' opinion, if not to dictate their action upon

<sup>1</sup> See speech by Harrison (*ibid.*, LXIV, 3038), implying that Lodge himself chose the assistants, without conference action.

<sup>2</sup> A recent Sergeant-at-Arms of the Senate thinks that there is now little left of direct party discipline in House or in Senate. 'But in the old days, when a whip cracked the lash, those who heard it jumped.' D. S. Barry, *op. cit.*, 110-11. He had been secretary to Nelson W. Aldrich!



major issues; but for the most part routine business is left in the hands of the Steering Committee. In the days of Allison and of Hale the Republican conference chairmanship carried with it the chairmanship of the Steering Committee; but in recent years, though taking *ex-officio* membership for himself, the conference chairman names some other member to head this committee. The vice-chairman and the whip are *ex-officio* members. The total membership usually ranges from nine to eleven.

The selection of members is influenced by seniority of service, by desirable representation of geographical sections or of group interests within the party, and also by the conference chairman's own notions as to the quantity and quality of leadership that is worth seeking. When Lodge named as members of the Republican Steering Committee La Follette, who by voice and by vote had bitterly opposed almost every Republican measure, and France, an individualist of slight influence in the Senate or in the party, he was giving assurance that little effective steering would be done by a committee of such personnel. In contrast with this committee, foredoomed to futility, was that of 1924, when an 'insurgent' was dropped from the list and a place given to Butler — a most unusual assignment for a new Senator, but logical in view of the fact that he was Chairman of the Republican National Committee and President Coolidge's most intimate friend in the Senate. So Senator Hanna, as National Committee Chairman, had conducted McKinley's second campaign.

The Steering Committee is most in evidence in the closing weeks of the session, when it is trying to determine the order in which measures shall be brought up for consideration and a final vote.<sup>1</sup> Such preferred lists provoke criticism on the floor from Senators whose favorite measures are not given such favored routing.<sup>2</sup> In the

<sup>1</sup> 'The British Cabinet assumes control of the Commons' order of business from the opening of the session, and its steering is constant and steady; the Steering Committee in Congress, on the other hand, hardly begins to function until the ship is in the breakers; then it attempts to get it through the dangerous waters.' (Woodrow Wilson.)

<sup>2</sup> May 19, 1920, Lodge, replying to such a protest, that they had 'denied any place in the legislative program to other measures,' said:

Lodge: They deny no place to any bill. It is for the Senate to take up any measure it sees fit.

Kenyon: I understand perfectly well that the Steering Committee cannot deny a place to bills, but I understand full well just how the matter is brought about, and nobody is deceived at all. . . . They do not deny a bill a place, but they never reach it.

Lodge: We attempted to pocket no bill. We tried to arrange the necessary business of the Government so as to get the great supply bills out of the way, and then it is for the Senate to say what they will take up next.

May 25, 1926, Bruce said as to a certain bill: 'I do not see any use in having it brought to the attention of the Steering Committee if the steering apparatus does not

closing hours of a Congress, March 4, 1919, La Follette, by a speech which filled ten pages in the *Congressional Record*, held up and prevented the passage of supply bills carrying appropriations totaling nearly a billion dollars, the while he protested:

It is high time for Senators to rebel against any power, whether it comes directly from the Executive, or from a congressional Steering Committee, which attempts to coerce Senators into playing the shameful part of automatons and blindly voting measures through, imposing hundreds of millions of taxes upon the people, without the opportunity to consider, discuss and amend, or to know, in fact, the true meaning and significance of their provisions.

Should it not be possible to secure more effective 'steering'? Various proposals have been advanced, with that object in view. In a notable letter to the Republican leader, Lodge, one of the youngest Republican Senators, McCormick, urged that there be constituted 'a Steering Committee which may be truly representative of the average opinion of the Republican majority of the Senate, and which in collaboration with the Steering Committee of the House may labor energetically and effectively to enact our legislative program.'<sup>1</sup>

This proposal, upon which McCormick had conferred with divers Republican Senators including Curtis, vice-chairman of the conference, was in accord with a plan which had been put forward by the retiring floor leader of the House, Mondell — that in each branch of Congress the party should have its representative Steering Committee, holding regular and frequent meetings; that at stated times the Senate and the House Steering Committees should come together for joint conference; and that at less frequent intervals the President of the United States, then of the party in control in each branch, should meet with this joint conference of the Steering Committees, to plan the party's legislative campaign and decide upon its strategy.

But to the veteran Chairman of the conference this innovating

work. . . . I recall an old English adage on that subject. It says: "We row ourselves, we are steered by Fate"; and I am beginning to think that, so far as the Steering Committee is concerned, it is steered by Fate, not by desire.'

<sup>1</sup> McCormick declared: 'We owe the country' the constituting of such a Steering Committee, and also the abolition of the binding seniority rule in the makeup of the Senate standing committees (p. 299).

This letter, read into the *Congressional Record* (Jan. 14, 1923, p. 1233) by a Democrat, led to facetious debate. Two Senators, prominent in Republican organization, denied knowledge of who the members of the Republican Steering Committee were, and Watson added: 'As long as the Steering Committee does not steer, I guess it does not matter much who its members are. . . . McCormick may know whether or not they have met. I do not.'

plan for actually vitalizing the Steering Committee made no appeal. Writing of 'Leadership in Congress,' George Rothwell Brown commented:

Lodge, in the seclusion of his study, in solemn conference with himself, could have formulated a party program and defined a policy. But . . . he was rather bored by conferences when others were present, and one fancied that he regarded the Steering Committee as only a bit of nonsense, exactly the place indeed for the La Follettes and Frances of the Senate.<sup>1</sup>

<sup>1</sup> *Op. cit.*, pp. 268 ff.

In several letters to the writer Mr. Mondell, the originator of this plan for securing team-play between the Executive and the party organization in both branches of Congress, has been so kind as to recount the workings of the plan in its brief and disappointing trial. This experience deserves to be summarized here, because of the clarity with which it brings to light some of the difficulties in the way of securing co-operation between the party organizations in the Senate and House.

Soon after the curbing of the Speaker's powers, the Republicans lost control in the House. While they continued in the minority, 1913-19, the project of a Steering Committee was taking shape, but the committee in its present form was not brought into existence till after a conference of Feb. 7, 1917. As originally set up, the new organization did not assign a place on the Republican caucus's Committee on Committees nor on its Steering Committee to the Speaker, who was already excluded from the Standing Committee on Rules. This left him in entire isolation from the party's legislative organization, so that he would secure only at second-hand information as to the discussions and decisions of the Steering Committee. But Speaker Gillett gladly accepted Floor Leader Mondell's suggestion that the Steering Committee meet in the Speaker's room, and that he be present and take part in its deliberations. In this informal way the Speaker came to be virtually a member of the committee.

When the new Steering Committee had begun to show its effectiveness, Floor Leader Mondell was authorized to discuss with the Senate Steering Committee the project of holding joint meetings. Lodge showed no enthusiasm for the project, but it met with more favor from some other members of the Senate committee, and at a meeting in Lodge's room it was finally agreed that it would be an excellent thing to have an occasional joint meeting of the two committees for the purpose of talking over the business of Congress, and, so far as practicable, agreeing, in a general way at least, on the party's legislative program.

Accordingly, the following week a first joint meeting was held in a room which had been assigned to the House floor leader on the legislative floor of the Capitol near the rotunda. Four or five members of each of the committees were present. Mondell outlined what the House members had in mind in a general way as a legislative program. Lodge stated that, with the exception of two or three of the measures mentioned, he believed that his committee and the Senate would be favorable to the carrying-out of the suggested program. He was careful to say, however, that no assurance could be given that the Senate would carry out such a program as the committee might propose. A second joint meeting was attended by a fair number from both committees. At the outset, Lodge showed annoyance at a new House rule in regard to Senate amendments (House Rule XX, cl. 2; see p. 460, n. 5), which he looked upon as an attempt to coerce the Senate. After some explanation, he grudgingly acknowledged that the House probably had acted within its rights. There followed a general discussion of several measures then before Congress or in contemplation. It proved to be the best of the joint meetings held, as it gave opportunity for presenting the House and Senate views upon pending questions.

Soon after this meeting a member of the Senate Steering Committee came to Mondell with the query whether some of the joint meetings could not be held on the Senate side in Lodge's office. Apparently the Senators were annoyed that their meeting-place, though as near the center of the Capitol as the rotunda would allow, were



This experience did not shake Mondell's belief that such joint meetings of the Steering Committees could be made exceedingly helpful.

They would serve to bridge the legislative gulf that now so frequently separates the two Houses, and remove many misunderstandings. But I doubt if this can ever be accomplished until the Senate, by the adoption of a cloture rule, has taken it out of the power of a single Senator to paralyze a wise and carefully considered program. That, of course, is quite another story.<sup>1</sup>

Be it granted that 'parliamentary responsibility' in Congress is neither feasible nor desirable, and that the great mass of measures considered by Congress are non-partisan. Nevertheless, there is a large element of absurdity in a situation where the leaders of a political party, which by a hard-fought and costly campaign has secured 'control' of the Executive and of both branches of Congress, show themselves unable (or unwilling) to bring these forces together for the working-out of the simplest elements of a consistent legislative program.

nevertheless on the House side. When House members indicated a preference for holding the next meetings at the same place as the earlier ones, it was some time before Lodge and his colleagues could be brought to agree upon a convenient time for meeting. To that meeting came Lodge with but two of his colleagues. It seemed to some of the House members that Lodge enjoyed the meetings in proportion as the attendance dwindled. He reported a shift in Senate conditions, so that there was great uncertainty as to some features of the program which had been discussed. The meeting dragged, and it became quite apparent that the individualistic temper of Senators was not favorable to these joint meetings.

At a later meeting, the House members succeeded in removing a misunderstanding on the part of Senators as to the attitude of the House majority on a pending measure. But at the next joint meeting — which proved to be the last — Lodge said that he feared his committee could not be very helpful to the plans and purposes of these joint sessions. In the first place, he explained, the Senate Steering Committee seldom met, and did not often reach an agreement among themselves — an interesting avowal from the leader who could determine the frequency of its meetings, and who had himself given to the committee such a personnel that agreement would have been a miracle. In the second place, he declared that no assurance could be obtained from the committee, as constituted, that any concerted effort would be made to carry out a given program, nor could any committee even guess what the Senate would conclude to do.

So ended the effort to continue formal joint meetings of the two Steering Committees.

In the very First Congress, when political parties were in embryonic condition, a joint 'routing' committee was constituted, to decide what measures should be given precedence and a chance of passage. Such committees were formed in several later Congresses (p. 311).

At the opening of the 72d Congress, Dec. 7, 1931, the Democrats — then in control of the House but not of the Senate — announced that a Joint Democratic Committee on Party Policy had been formed, consisting of ten Senators and nine Representatives.

<sup>1</sup> Mr. Mondell's letter of Feb. 29, 1928, has supplied most of the material relating to these joint meetings of the Steering Committees, held between 1919 and 1922.

*The Committee on Committees*

Of most influence upon the legislative work of Congress is the personnel of each party's Committee on Committees. This 'veiled legislative autocracy,' as Beveridge called it, is enabled to function by the procedure in accordance with which the makeup of the standing committees is determined.<sup>1</sup>

The chairman of the Democratic conference becomes *ex officio* Chairman of its Committee on Committees; in the Republican organization some other member heads this committee. In the conference of each of the parties it is customary to devolve upon the chairman the choice of members of this committee, but seniority and continuity of service are so controlling influences that there are few surprises when its membership is announced.

The size of the Republican Committee on Committees rose from three in 1859 to nine in 1877. For the hard-fought contest over organizing the Senate and the choice of committees in 1881 it was reduced to five, but has since been raised to nine, which became, also, the size of the Democratic committee. At times the committee has held hearings, to secure advice as to the assignment of chairmen or of lay members on the standing committees. Its 'slate' is reported to the conference for approval, which is usually given with little demurring, although dire threats may have been uttered in advance. Occasionally, however, there have been bitter reproaches from disappointed Senators when the list was presented.<sup>2</sup> This committee also presents to the conference proposals as to the proportionate representation upon the standing committees to be allotted to the minority, gauged according to its size on the floor of the Senate.<sup>3</sup> The olive branch is sometimes extended to 'insurgents' by allowing to their group a disproportionately large representation upon the Committee on Committees.<sup>4</sup>

The minority's list of nominations for committee assignments, after approval in conference, is handed by the minority leader to the majority leader, who presents them together with those from his own party as a complete committee list.<sup>5</sup>

<sup>1</sup> See p. 285, for La Follette's protest against this procedure. Also, A. J. Beveridge, 'The Fifth Wheel in our Government,' *Century*, LXXIX, 213.

<sup>2</sup> Page 301. See Tillman's angry speech, March 17, 1923, *Cong. Rec.*, 30-33.

<sup>3</sup> In 1921, when the number of Democrats in the Senate dropped from 46 to 37, the ratio on the major committee was reduced from 7:10 to 6:10.

<sup>4</sup> In 1911 four places were given to the 'insurgents.'

<sup>5</sup> See Watson's presentation of the entire list, Dec. 12, 1927, *Cong. Rec.*, 482.

---

**SENATORIAL CAMPAIGN COMMITTEE**

The conference of each party provides for the choice of its Senatorial Campaign Committee to take charge in states where contests for seats in the Senate are to take place. The selection of its chairman may give a more or less clear indication of what the party leaders intend shall figure as major issues in the campaign. Thus, in 1922, when the minority leader named a bitter opponent of the League of Nations as Chairman of the Democratic Campaign Committee, it was inferred that only domestic issues would be stressed in the campaign, the Wilsonian leadership being abandoned.<sup>1</sup>

**COMMITTEE ON PATRONAGE**

In recent years the Republican conference has made provision for a Committee on Patronage, to apportion the 'loaves and fishes' at the disposal of that party, then in control. In the Republican conference of March 12, 1925, the question was hotly debated whether in the case of the four 'insurgents,' who had been read out of the party for actively opposing the election of the Republican candidate in the presidential campaign of 1924, there should be a reduction in the allowances for personal appointments to fill positions in and around the Capitol. Successful opposition to this proposal was led by the Republican whip, on the ground that the party had gone far enough in disciplining these offenders, whose votes might prove valuable in the near future.

'The Patronage Committee of the minority in the Senate does not function.'<sup>2</sup>

**PERSONAL, UNOFFICIAL LEADERSHIP**

---

Most effective leadership in the Senate has at times been exercised by men who owed their power to the holding of no office provided by

<sup>1</sup> This selection was made only after conference with all the Democratic candidates for election, and with the unanimous consent of the Democratic Steering Committee. Press dispatch, Sept. 7, 1922.

<sup>2</sup> The sententious comment of the minority leader, in 1928, to the writer.



the Constitution or by their party organization, but to their own personal capacity to lead. In the words of Woodrow Wilson:

Nature intended that leaders should be self-selected, by proof given of their actual quality in the business in which they aspire to lead.

While House leadership, in his opinion, has been won by service on the floor, by men as masters of parliamentary tactics, men of will and resource rather than men of counsel, the Senate, on the other hand, has been inclined to follow its veterans, men of long experience, who by many evidences of good sense and cool judgment have won their party associates' entire confidence that they will not blunder.

The leaders the Senate prefers are almost of necessity its most conservative men — men most likely to magnify the powers and prerogatives of the body they represent and to stickle for every privilege it possesses, not at all likely to look to the President for leadership, or to yield to the House upon any radical difference of opinion.<sup>1</sup>

Great influence is often exercised by the chairman of one of the major committees, especially at a time when the tasks of that committee are exigent. In the years since the World War the Chairman of the Committee on Foreign Relations has inevitably played a leading rôle. The vital interests always affected by the great money-raising and money-spending committees put enormous powers in the hands of their chairmen. It was mainly through long-continued and varied committee service that Hale rose to leadership. Aldrich, on the other hand, for the most part kept off of committees, but he made the chairmanship of the Committee on Rules and the Committee on Finance the agencies for the exercise of his extraordinary natural ability as a legislator and a party manager. A wit wrote of him that 'he cared not who had the title of "Manager of the United States" so long as he made its laws.'

That described the Senator to a nicety. The whip was not cracked loudly, but it was cracked, and behind the pleasant smile there was a backbone of steel. . . . It was Aldrich's firm belief that the people did not know what they wanted in a legislative way, and that, moreover, they did not know what was good for them.<sup>2</sup>

For thirty years, 1881-1911, Aldrich was a member of the Senate, and during much of that time this dominant personality was its real leader, 'giving to the Republican ranks an efficiency and cohesiveness which they have lacked in recent years,' when many even of

<sup>1</sup> *Constitutional Government of the United States*, 137 ff.

<sup>2</sup> D. S. Barry, *Forty Years of Public Service*, 159-60.

his critics often wished that he were in the Senate once more, in his old-time power.<sup>1</sup>

There succeeded to Aldrich as the real leader of the Senate a man of very different type. Within a remarkably short time after entering the Senate, with the prestige of no important committee chairmanship Crane came to be recognized on both sides of the Chamber as the 'most influential man in the Senate.' He declined the chairmanship of the Committee on Appropriations — as he declined the position of Secretary of the Treasury — preferring to remain in the background as the tactful, sagacious, and disinterested adviser of his party.<sup>2</sup>

A leadership more like that of Aldrich was exercised a few years later by Penrose, a machine man of Quay's training. Despite the protests of Progressives, he was made Chairman of the Committee on Finance. In the Senate he showed both ability and courage in party management. Even from his sick-bed in Atlantic City he so astutely controlled his forces in the Chicago convention as to have a large part in determining Harding's nomination in 1920.<sup>3</sup>

In recent years there has been a woeful lack of effective leadership in the Senate. The difficulties in the way of carrying a distinct party program forward to enactment are obvious. Added to the chronic individualistic temper which is characteristic of the Senate, there came to that body the evanescent Farmer-Labor Party, and the Farm Bloc, and a 'fringe' of new men — some elected as Republicans and some as Democrats — ever ready to vote with their erstwhile opponents upon some issue affecting their state or section. Con-

<sup>1</sup> *Boston Herald*, editorial, Jan. 1, 1922.

In a breezy article in *New York Times*, Aug. 22, 1920, Charles Willis Thompson contrasted the 'Big Five' with the 'Big Dozen,' in Senate leadership. 'The Big Five was the greatest body that ever ruled the Senate. . . . It concerned itself with legislation and policies, not with king-making. It did not try to run the White House. In other words, it was a coterie of statesmen, not so much of politicians.' He listed 'Allison, Spooner, Hale, Platt (Ct.), and the mighty Aldrich,' and contrasted them with 'the nucleus of the present Big Dozen — Lodge, Penrose, Smoot' — party workers, taking their tone from Penrose.

<sup>2</sup> See comments of ex-President Taft and of leading men of both parties in the Senate, in S. B. Griffin's *W. Murray Crane: A Man and Brother*. From the Press Gallery at times Crane's leadership seemed less idealistic, but very practical. O. K. Davis, *Released for Publication*, 170-71.

<sup>3</sup> Page 963. Penrose was the last of 'the amazing Republican organization [in Pennsylvania] which without a single lapse or break has continued in the hands of just four men for a period of sixty-five years.' Every one of these most astute politicians served in the United States Senate for long terms, as follows: Simon Cameron, 1845-49, 1857-61, 1867-77, when he resigned to make place for his son, whose election he dictated; James Donald Cameron, 1877-97; Matthew Stanley Quay, 1887-1905; Boies Penrose, 1897-1921.

servatives among Republicans and Democrats find themselves more in accord with conservatives among their traditional foes than with the radicals of their own party name. Neither Lodge nor Underwood proved temperamentally adapted to doing what would be necessary in order to weld the incongruous elements of his party into an effective force for offense or defense. Among Senators less firmly attached to the two old parties, La Follette showed great strength as a leader. Using machine methods and exacting personal loyalty, he fashioned an organization highly effective for bargaining and obstruction.<sup>1</sup>

### INFLUENCE UPON THE SENATE FROM OUTSIDE

---

Thus far the attempt has been to present the conditions under which some degree of leadership or guidance in the Senate is exercised by its own officers, of its own choosing or imposed upon it by the Constitution; by leaders formally chosen by their respective party organizations; or by individual Senators whose mandate comes from neither of these sources, but from their demonstrated capacity for leadership.

But it often comes about that official pressure from the outside is strongly exerted to influence the Senate's course of action.

#### BY THE PRESIDENT

The President is associated with the Senate in functions of high importance. If he is of the party in control in the Senate, he inevitably seeks to assert himself as party leader to carry into effect the party program. For formal persuasion of the Senate as a body he may use his message or address before the Senate or its committees, or his

<sup>1</sup> In December, 1922, at his initiative there was completed the organization of six joint committees, made up of Progressives and radicals, dealing with Agriculture, Labor, Railroads and Shipping, Natural Resources, Credits and Taxation. The first, third, and fifth were headed by Senators. (Press dispatch, Dec. 29, 1922.) Later La Follette went so far as to issue an appeal to the voters of Minnesota, urging them to defeat the Republican candidate for the Senate and re-elect Magnus Johnson. 'Every vote counts vitally,' he declared, in making practically absolute the dictation of the Progressive group in all matters of legislation upon which the two major parties were divided.



veto. In the Chamber the natural liaison officer is the majority leader, but if he be not congenial, the President may choose some other representative to urge his views.<sup>1</sup> He may seek to win individual Senators by personal conference, by the use of patronage,<sup>2</sup> or by various social amenities. By public addresses, in person or by radio, by communications to the press, either authoritative or screened by some silly phrase such as 'the President's spokesman,' he may attempt to bring public opinion to bear upon the Senate. He may even appeal to the country at large to elect men who will support his policies, or to the voters of an individual state to elect or defeat a candidate for re-election because of the record he had made in the Senate.<sup>3</sup>

#### BY THE HOUSE OF REPRESENTATIVES

In legislative matters the two branches of Congress are co-ordinate, save in the matter of originating bills for the raising of revenue—a special constitutional privilege of the House, which the Senate has practically reduced to a nullity. In all other matters the House by amendment may force an issue with the Senate, though in a deadlock the upper branch usually has the advantage. However, by changes in its own rules the House has curbed, if not 'coerced,' the Senate.<sup>4</sup> The phrases of the Constitution may seem to imply that treaty-making and the control of foreign relations are affairs in which the House has no part; but the Senate never ratifies a treaty involving the expenditure of money without the consciousness that the House must give consent to such appropriations.<sup>5</sup> Commerce with foreign nations may be regulated either by treaty or by Act of Congress, and the

<sup>1</sup> J. Q. Adams declared that Jefferson's whole system of administration seemed founded upon the principle of carrying through legislative measures by his personal or official influence. In the case of the proposed Florida purchase he declared that the bill had been 'very reluctantly adopted by the President's friends on his private wishes signified to them in strong contradiction to the tenor of all his public messages.' *Memoirs*, I, 403, Feb. 7, 1806.

<sup>2</sup> For a most striking case of the use of patronage to secure three essential votes (in this case from Representatives), see C. A. Dana, *Recollections of the Civil War*, 174-77.

<sup>3</sup> President Wilson did both of these things (p. 989).

Entirely without precedent in extent and variety were the pressures brought to bear upon Congress by President Roosevelt to secure support for New Deal legislation (p. 994). In 1937, Representative Ludlow (Ind.) declared that among the 77 major laws passed during the New Deal, 59 were written by the executive branch of the Government, and that the legislative branch wrote only 18 of the New Deal laws. As to the choice of the successor of Robinson, majority leader, see p. 481, n. 1.

<sup>4</sup> Page 469.

<sup>5</sup> Page 685.

House has shown great jealousy over alleged 'encroachments,' when treaties have contained provisions for tariff changes and reciprocity agreements.<sup>1</sup> Annexation of Texas and of Hawaii was accomplished by joint resolution originating in the House, after treaties had failed of ratification in the Senate.<sup>2</sup> Treaties may be denounced by joint resolution, originating in either House. It was only after the House had passed the affronting Sulzer resolution that President Taft directed the American Ambassador at St. Petersburg to denounce the treaty of commerce with Russia, and informed the Senate of his action.<sup>3</sup> Against earnest opposition from the Executive and in the Senate, the House forced into the Immigration Act of 1924 the clause excluding the Japanese.<sup>4</sup> Wars have usually been ended by treaties of peace, but Congress 'declared peace' with Germany in 1921, by joint resolution, after the Senate's failure to ratify the treaty.<sup>5</sup> In 1925, the House by a vote of more than ten to one gave its cordial approval to the protocol for the United States' adherence to the World Court nearly a year before the Senate at last took action, loading our ratification with such reservations as to make it unacceptable to the other powers.<sup>6</sup>

#### BY CONSTITUENTS

State legislatures address the Senate urging specific action upon most varied policies even as to foreign relations — the recognition of Cuban belligerency and of the independence of the Irish Republic.<sup>7</sup> In the days before the ratification of the Seventeenth Amendment it was the habit of state legislatures, by joint resolution, to '*instruct* our Senators and *request* our Representatives in Congress' to take specific action upon pending legislative measures — the discrimination in the phraseology being intended to emphasize the 'responsibility' of the Senators to the body from which they had received their election, however attenuated that 'responsibility' might have become because

<sup>1</sup> Page 635.

<sup>2</sup> Pages 633-36.

<sup>3</sup> Page 672. See President Taft's comment upon his action.

<sup>4</sup> Japanese exclusion had theretofore been secured by 'gentlemen's agreement' (pp. 648-51).

<sup>5</sup> Page 703. This resolution (S. J. Res. 16) was introduced by a Senator, but a joint resolution may originate in either branch. *Cong. Rec.*, LXI, 3261.

<sup>6</sup> Pages 693-94. On the floor of the Senate, Borah, Chairman of the Committee on Foreign Relations, frankly declared his hope that this would be their effect.

<sup>7</sup> Note Coughlin's inflammatory radio speech, which incited the sending of scores of thousands of telegrams to Senators, telling them to vote against adherence to the World Court (pp. 712-13).

of changes in the personnel of the legislature since the Senators were elected, or were given previous 'instructions.'<sup>1</sup>

Since the advent of popular election of Senators, state legislatures, assuming to speak as the representatives of the voters, still continue to voice to the Senators the wishes of 'the people.' In some states such enlightenment is conveyed more directly — though perhaps not more accurately — by the votes cast at a state election upon a specific question placed upon the ballot under the provisions of a 'public opinion' law.<sup>2</sup> Responsibility to the electorate reaches the acme in the recall, as applied to United States Senators by the constitution of Arizona.<sup>3</sup> Party conventions and state committees are at times reported to have sent admonitions, if not instructions, to Senators whom they had been instrumental in electing.

BY ECONOMIC 'INTERESTS' — CORPORATE WEALTH AND THE  
'LOBBY'

Senate action may be guided and Senate decisions determined by influences entirely unknown to the Constitution and the law of the land. In the study of a political institution — particularly, of a legislative body — it is well to bear in mind John Stuart Mill's maxim: 'in politics, as in mechanics, the power which is to keep the engine going must be sought for outside the machinery.'<sup>4</sup> In the last quarter of the nineteenth century, when states' rights and slavery, Civil War and Reconstruction had ceased to dominate American thought, political issues came to be frankly recognized as essentially economic. It has inevitably resulted that during the past fifty years the United States Senate, where enormous powers are placed in few hands, has been beset by those seeking legislative favors for their special interests or legislative remedies for their real or fancied economic ills.

<sup>1</sup> See John Tyler's letter as to the 'instructions' given him by the Virginia legislature (p. 1028).

<sup>2</sup> Senators may earnestly crave such an expression of the wishes of their state's voters. After the humiliating outcome of the Republican primary in Pennsylvania, 1926, in which every other issue had been obscured by the question as to the individual candidate's attitude toward 'Repeal,' David A. Reed declared his intention to advise his friends in the legislature to support the proposition for a referendum. 'Until that question is clearly and directly decided by such a referendum, the present chaotic conditions of politics in Pennsylvania will continue.' (May 19, 1926.) Some of the most earnest Prohibitionists in the Senate avowed their willingness to abide by the vote which might be taken in a 'Repeal' referendum in their states (p. 1031).

<sup>3</sup> Arizona Senators are elected upon a pledge to resign, if and when requested to do so by vote of their constituents in a 'recall election' (p. 1025).

<sup>4</sup> H. B. Learned, *American Historical Review*, XX, 412.



Such pressure may be exerted either with the object of determining who shall be elected to the Senate, or of influencing the action of those who are already members of that body. The non-political organizations which have most laid themselves open to suspicion of attempting both of these methods of dictation have been the great corporations which seek the control of means of communication, of the sources of power, or of foodstuffs, fuel, or basic raw materials.

In the closing decades of the nineteenth century the 'railway interests' were popularly believed to be the worst sinners against the integrity of senatorial elections. A railway president once declared that he had never cared to be a United States Senator himself, because he had made so many of them!<sup>1</sup> An influential New England Senator, explaining his retirement to private life, said that he had been run over by a railroad train, referring to the opposition to his reelection put forth by the railway corporation which for decades was alleged to have dominated his state's government.<sup>2</sup> In those decades it was thought to be no mere coincidence that New Jersey, the 'Mother of Trusts,' and New York, the center of great financial interests, were for years represented in the Senate by men holding presidencies and other positions of highest responsibility in corporations of the very type which it was then becoming increasingly evident must be subjected to some form of effective control in the interests of the public.<sup>3</sup> A list of the directorates in public-service corporations held by the Senators from half a dozen of the wealthiest states would have been a long one, and of great significance.<sup>4</sup> Close observers of the Senate in that period were convinced that not a few of its members owed their presence there chiefly to the fact that they were the candidates who proved particularly acceptable to great corporate interests.<sup>5</sup>

<sup>1</sup> This remark was made 'very emphatically' to William Lyon Phelps, who tells of it in *Scribner's Magazine* (July, 1926), 98. This president's activities were of the period, 1880 to 1900.

<sup>2</sup> W. E. Chandler, who ended his second term in the Senate in 1901.

<sup>3</sup> It used to be said that for years the introduction of the parcels post in the United States was delayed by four 'arguments' — the Adams Express Company, the American Express Company, the Wells-Fargo Express Company, and the United States Express Company. The president of the last was the silent Senator but 'Easy Boss,' T. C. Platt.

<sup>4</sup> Depew, while in the Senate, was said to be receiving an annual retainer of \$20,000 from the New York Central Railway, though rendering no specific services. He was holding 74 directorships. Both the Senators from a North Pacific state were members of the firm which had lately been the attorneys of a subsidized continental railway which traversed that state.

<sup>5</sup> For further instances, and citation of references, see G. H. Haynes, *Election of Senators*, 176-79, 57, 95, and *passim*.

The belief that corporations, trained in the art of obtaining charters and other favors from state legislatures, were no less expert in gaining the election of Senators of their liking, had much weight in securing the adoption of the amendment providing for the election of Senators by direct vote of the people. Doubtless recognized representatives of corporate interests are less frequently elected to the Senate under the present system. But he who cherishes the belief that a constitutional amendment has made it impossible for those in control of certain public utilities and other gigantic corporations in actual practice to determine what candidates for the Senate shall be nominated in the direct primaries and elected at the polls, will do well to read the committee reports and the debate which led to the Senate's refusal to allow Frank L. Smith to take the oath as a Senator from Illinois.<sup>1</sup>

Pressure on the part of outside organizations to secure from legislators support for measures in their interest is popularly termed 'lobbying.' The individual critic is apt to apply this term only to such efforts on the part of organizations that he disapproves. Precisely similar activities on the part of organizations that he approves he characterizes as 'letting in the light' — 'a campaign of education.'

Lobbying methods and the personnel of the lobby change from decade to decade. 'Time makes ancient bad uncouth!' 'Some officers of the Senate still [1928] remember the days when a picturesque, silver-haired old gentleman and his sharp-eyed aide were familiar figures in the purlieus of the Senate Chamber. In their pockets were adequate supplies of railway pass-books. Other consequential gentry were dispensers of telegraph franks, pullman car passes and express franks and various little knicknacks of that kind that helped materially to pass away their time agreeably — and cheaply.'<sup>2</sup> That crude type of lobbying is a thing of the past — thanks in part to the drastic provisions of interstate commerce legislation. The lobbying of today is much more highly organized — and probably far more effective in controlling votes.

The legislator of today can scarcely turn about without being confronted with the legislative representatives of a bewildering variety of interests, large and small.

<sup>1</sup> Pages 144 ff. The Senate vote showed that a majority accepted the committee's finding that to Smith's campaign fund, while he still held the position of Chairman of the Illinois Commerce Commission, there had been given nearly \$200,000 as a personal contribution by the 'greatest public-utilities magnate' of the state, if not of the United States. This man had also contributed liberally to the Democrat's campaign fund!

<sup>2</sup> David S. Barry, *Forty Years of Public Service*, 123.

We have reached a condition in which the political fortunes of a member of Congress do not in the main depend upon the basic soundness of his views, his faithful attendance upon the sessions of Congress, his earnestness and diligence and good faith in bearing his share in the performance of and responsibility for the work of Congress, but to a considerable extent upon the good will, the friendly attitude, the friendly reports of gentlemen who, as legislative representatives sit in the galleries, and, as the favored ones in old Roman days decreed life or death to the struggling gladiator in the arena by gesture of thumbs up or thumbs down, determine the political life and fortunes of members of Congress.<sup>1</sup>

Such was the comment of Frank M. Mondell, based on experience covering twenty-six years of service in the House. He declared that the country would have been better served if members had voted as they talked in the cloakrooms, rather than under the pressure of aggressive minorities as represented by the organized lobbyists.

It is significant that in recent years there has been a great increase in the number of organizations which have established headquarters in Washington where they may keep close watch upon every development in Congress which may affect their several interests. Among the Senate's nearest neighbors on Capitol Hill are the national headquarters of the American Federation of Labor, of the Methodist Episcopal Church, and of the National Woman's Party.<sup>2</sup> At the other end of Pennsylvania Avenue are established the Chamber of Commerce of the United States, the Anti-Saloon League, and the Association of Railway Presidents. Near at hand are the watch-towers of the American Legion, and of the K.K.K. and K. of C. On the floor of the Senate it was declared that in the Washington telephone directory there were listed the names of 'some three hundred and fifty-odd associations here which undertake to run the government at so much per each influence exerted.' The speaker was discussing his own resolution, for the investigation of the activities of lobbyists in and around Washington who, it alleged, 'filch from the American public more money under a false claim that they can influence legislation than the legislative branch of this Government costs the taxpayers. . . . The lobbyists seek by all means to capitalize for themselves every interest and every sentiment of the American public which can be made to yield an unclean dollar for their greedy pockets.'

<sup>1</sup> In his review of the record of the 67th Congress, in *Cong. Rec.*, March 12, 1923.

<sup>2</sup> In press dispatches of April 30, 1929, see Copeland's letter to the executive secretary of the Methodist Board of Temperance, Prohibition and Morals, protesting in explicit terms against its 'manifest efforts to dictate and control legislation,' which he, as a member, considered not 'the function of the Methodist Church.'



Other Senators demurred to the use of such extravagant language, and the speaker — Senator Caraway himself — frankly acknowledged that many of these organizations in good faith furnish accurate information, often highly essential for the service of Senate committees and of individual Senators when attempting to deal discriminatingly with complicated legislative proposals affecting modern economics and industrial conditions.<sup>1</sup>

In the first session of the Seventieth Congress, ending May 29, 1928, the charge of lobbying was raised by one side or the other — or, in some instances, by both sides — in the case of almost every closely

<sup>1</sup> How shall a Senator secure needed technical information as a basis for intelligent tariff legislation?

The desire to secure expert counsel as a basis for intelligent lawmaking may easily bring the legislator into embarrassing relations with those whose business interests depend upon legislative favors. In 1929, when the Hawley-Smoot Tariff Bill was in the making, on the Finance Committee was Bingham, of Connecticut, a state of many protected industries. Having little knowledge of the intricacies of the tariff, he wrote to the Connecticut Manufacturers' Association asking the 'loan' of a man well versed in tariff problems. In response its president sent his personal assistant, Charles L. Eyanson, a man receiving from the Association a salary of \$10,000. In Washington Bingham placed Eyanson on his staff as one of his secretaries on the pay-roll of the Senate, the salary which he thus received being paid over to the regular secretary whose place he was taking, and who still continued to perform his routine duties. 'Secretary' Eyanson accompanied Bingham in his attendance upon the hearings conducted by the Finance Committee. Later, when the majority members with closed doors began the decision on individual rates, Bingham received permission to have 'one of his secretaries' attend him at those secret conferences. A few days later, however, upon learning of Eyanson's official status with the Connecticut Manufacturers' Association, Chairman Smoot suggested that it would be best for him not to attend. In the Senate, this situation was set forth by Harrison. (Sept. 25, 1929, *Cong. Rec.*, 3949.) The subcommittee of the Committee on the Judiciary, which was investigating lobbying, brought in a report accompanied by documents. (Oct. 26, 1929, *ibid.*, 4922.) On the basis of the information thus disclosed, Norris introduced a resolution of censure. When this came before the Senate for consideration, Bingham read a prepared statement, declaring that with the best of motives he had sought expert counsel in a field where he himself lacked knowledge; that Eyanson was the 'best posted of all his constituents on tariff matters'; that he saw no impropriety in his treating the personnel of his secretarial staff — as did other Senators — as a personal matter; that not a penny of what Eyanson had received from the Senate pay-roll had stuck to the fingers of Bingham or Eyanson; and that throughout the whole affair his 'whole-hearted desire had been to represent the interests of the state of Connecticut and to promote the prosperity of the United States.' (*Ibid.*, 5114-15; see also 3951; 4947.)

Although it was evident that politics entered into the debate and the vote, yet to a large majority of his colleagues — and to the public — his conduct seemed reprehensible. The press called it 'almost unbelievably stupid.' By a vote of 54 to 22 the Senate passed the Norris resolution, declaring Bingham's action in placing Eyanson upon the official rolls of the Senate under conditions set forth above, 'while not the result of corrupt motives on the part of the Senator from Connecticut, is contrary to good morals and senatorial ethics, and tends to bring the Senate into dishonor and disrepute, and such conduct is hereby condemned.' (*Ibid.*, 5132.)

Twenty-seven years had passed since the Senate by formal vote had censured one of its members, in the case of the disorderly conduct of two South Carolina Senators, Tillman and McLaurin. (Feb. 22, 1902, *ibid.*, 2087.)

contested issue. In the struggle in the Senate over the water-power investigation resolution, its sponsor, Walsh of Montana, repeatedly declared that it was opposed by 'the greatest and most powerful lobby in the history of Washington.' Among the water-power lobby were several former Senators and a former Cabinet officer. At its head was said to be a former Senator who now was reported to have utilized — or abused — to the limit his 'privilege of the floor' in the Senate in laboring with his former colleagues to deflect from the Senate committee to the Federal Trade Commission the Walsh resolution for an investigation of interstate utility corporations. That object was accomplished.<sup>1</sup>

Measures for curbing the lobby received much attention in the Senate during that session. A bill was early introduced, requiring that lobbyists register with the Secretary of the Senate and the Chief Clerk of the House and disclose who their employers are, and state how much, if any, money they have been given, and then file a report at the end of each month of how they have disposed of the money.<sup>2</sup> Terms were defined in the bill as follows:

Lobbyist: One who shall engage for pay to attempt to influence legislation or to prevent legislation by the national Congress.

Lobbying: Any effort to influence the action of Congress upon any matter coming before it, whether it be by distributing literature, appearing before committees of Congress, or interviewing or seeking to interview individual members of either the House of Representatives or the Senate.

Violation of the Act would be punishable by a fine of one hundred dollars to one thousand dollars, or imprisonment from one month to a year, in 'a common jail,' or by both fine and imprisonment as afore-said in the discretion of the court.

Within a fortnight after this bill had been favorably reported by the Committee on the Judiciary, after very brief debate it was passed by the Senate, without a record vote.<sup>3</sup> In the House it was referred to the Committee on the Judiciary, where it remained pigeonholed for the remaining three months of the session.

<sup>1</sup> A year later the nomination of this ex-Senator for a federal judgeship came to the Senate. He appeared before a subcommittee and denied that he had ever used his privilege of the floor to solicit Senators' votes for or against any legislation, and declared that his only activities in regard to the power utilities companies had been in argument before a Senate committee, and in the examination of witnesses — the normal and legitimate services of an attorney. (Press report, Feb. 19, 1929.) His nomination was confirmed by the Senate.

<sup>2</sup> The Caraway bill — S. 1095.

<sup>3</sup> March 2, 1928, *Cong. Rec.*, 3935; 4222.

Discouraged as to the possibility of getting any anti-lobby bill passed by Congress, Walsh (Massachusetts) had introduced a resolution which sought to accomplish the same object for the Senate by a change in the Senate rules by the addition of a 'Rule XLI: Regulation and Registration of Legislative Counsel or Agents.' The proposed rule would require the registration of all persons employed for hire to advocate or oppose pending legislation; would authorize the Senate by majority vote to require the naming of all employers and employees in any such contract; and an account of all expenditures incurred or promised for the purpose; and would insist that chairmen of committees require all persons appearing before them to advocate or oppose pending legislation to state whether they are employed for the purpose, and if so, by whom employed.<sup>1</sup> No penalty attached to the violation of the rule, and experienced legislators queried whether its sponsor's object could be attained by so simple a method as the adoption of a Senate rule. He replied that the proposal was presented because, despite the almost certain impossibility of getting through Congress any anti-lobby legislation, this would give an opportunity to the Senate to lead the way toward some form of regulation of the lobby at the National Capitol. In due course it was referred to the Committee on Rules.<sup>2</sup>

How perplexing the problem of lobby regulation may become was illustrated by the situation which developed in the closing weeks of the first session of the Seventy-Fourth Congress (August, 1935), when a Senate committee and a House committee were excitedly investigating charges of lobbying on the part of the utility companies and on the part of the Administration in regard to pending legislation. The President had demanded that 'unnecessary' holding companies be abolished by 1942. From the management and from the security-holders of many holding companies came protests that the Administration-sponsored bill was unjust in imputing to all holding companies the faults of only the worst, that it was confiscatory and would work incalculable injury to many innocent and most deserving persons and institutions. The two branches of Congress deadlocked over the 'death sentence,' the Senate by a single vote approving that feature of the bill while the House rejected it by a vote of 216 to 146. The Senate committee, under Black's chairmanship, promptly brought to light highly discreditable activities on the part of certain holding companies, particularly the Associated Gas and Electric Company in

<sup>1</sup> Feb. 14, 1928, S. Res. 145.

<sup>2</sup> *Cong. Rec.*, 3418.



its dealings with its own subsidiaries, and in its admitted expenditures of some \$800,000 to defeat the Public Utility Bill. Some of its money found its way as retainers to lawyers in the inmost circle of Democratic and Republican party organizations. Employees of this company flooded Congress with thousands of telegrams bearing faked signatures, and started a 'whispering campaign' implying that the President and his advisers were either 'incompetent or insane.' Meantime, the House Committee had heard testimony from Representative Brewster, ex-Governor of Maine, that one of the Administration's co-authors of the bill had threatened that unless Brewster voted for the 'death sentence,' funds for the immense Passamaquoddy power development would be held up. To the closed sessions of the conference committee appointed to handle the bill, its chairmen insisted on bringing two of the Administration's counsel who had drafted the bill. In resentment at their intrusion, several members of the committee refused to sit in conference. When the chairman of the House committee moved that the House instruct its conferees to accept the 'death sentence,' the House again rejected it by a heavy vote, and authorized its conferees to exclude all outsiders from the conference.

The outcome — as almost always — was a compromise: no fixed date was specified for a general infliction of the 'death sentence' upon holding companies, and within narrow limits prescribed by the law there was given to the Securities and Exchange Commission some discretion in determining whether a given holding company shall be permitted to survive.

Not a word is to be said in defense of the illegal and contemptible practices of the Associated Gas and Electric and some other holding companies in their attempt to escape the 'death sentence' which seemed to threaten them. But the heavy adverse majorities in the House evidenced a widespread belief that the Administration's bill was unjust, and that the pressure which the Administration was exercising in the distribution of patronage and of relief projects, in expertly biased 'publicity,' and in its unusual efforts to influence the conference committee, showed a will not merely to lead but to dominate Congress.

That lobbying at Washington needs some curb few will deny. Yet Senators heartily in sympathy with the object of the Caraway Bill declared that its passage was unduly hastened in the Senate because members hesitated to oppose or criticize it lest they be thought to be 'siding with the lobbyists.' The main criticism expressed was that the

terms of the bill failed to discriminate between perfectly legitimate and desirable supplying of information and sinister 'lobbying.' A lobbyist within the meaning of the bill is one who is engaged in certain activities *for pay*. For what sort of pay? Secretaries, paid annual salaries to represent the general interests of charitable and other most worthy organizations, are constantly preparing and mailing to members of Congress literature of great value in connection with pending legislation. Would such a secretary be liable to the penalties of this proposed law, if he were not registered as a lobbyist, and if some part of his salary were not itemized and accounted for, as pay for this particular activity? Senators plied the author of the bill with questions as to special cases. Caraway replied:

Like any other law, this law will have to be enforced with common sense. . . . It only applies to that class of people who make a profession of influencing or who have for the time being the occupation for hire of influencing legislation.<sup>1</sup>

The bill failed to pass the House. In the next Congress there was appointed a subcommittee of the Committee on the Judiciary which — according to the terms of the Senate resolution under which it was constituted — was to investigate the activities of lobbyists in and about Washington.<sup>2</sup> Caraway became its chairman. While its hearings were 'in full blast,' Doctor Walter Lippmann wrote thus of its 'inquisition':<sup>3</sup>

The Caraway Committee is not really a committee to inquire about legislation. It is a sort of drumhead court-martial, established informally by the Senate to make effective the Senate's view that the lobbyist must be made publicly accountable.

Senators want to put all lobbyists in their place. . . . The regulation of lobbyists is, in short, a vital personal interest of the members of Congress. They know that a law regulating lobbyists will be effective only if it is ruthlessly and continually enforced.

Who is to enforce such a law? The truth is that Congress itself has to enforce it, and that is precisely what the Caraway Committee is doing. It is an extra-legal organization of the Government, ostensibly a legislative committee, in reality a composite detective agency, grand jury, prosecuting attorney, judge and public hangman, which has as its purpose the reform of lobbyists by terrorism. Stretching the power to subpoena witnesses and to punish for contempt, acting under the pretext of

<sup>1</sup> March 2, 1928, *Cong. Rec.*, 3933.

<sup>2</sup> For the resolutions, and the circumstances under which the committee was named, see *ibid.*, 4115. Its personnel was Caraway, Blaine, Borah, A. R. Robinson and T. J. Walsh. (Oct. 1, 1929.)

<sup>3</sup> 'The Senate Inquisition,' *Forum* (Sept., 1930), 129-32.

seeking information to legislate, the Caraway Committee is enforcing the principles of the Caraway Bill.

In any event, it is necessary to recognize that the record of the Caraway Committee raises a larger question than the manners and morals of Senator Caraway. It is whether the pressure of organized groups upon government can be decently and effectively regulated.<sup>1</sup> It is an enormously difficult question — perhaps the paramount question with which those inquiries we hopefully call political science have to deal in a modern democracy. . . . In a realm of affairs where there is as yet no settled law nor any particular respect for the traditional code of morals, Senator Caraway has set up a vigilance committee to improvise justice and, as is usually the case in such proceedings, to work off grudges. . . .

I would not wish to abolish the Caraway Committees; nor would I wish to submit to them. The inquisition is necessary if we are to keep the propagandists and lobbyists within any bounds whatever. On the other hand, resistance to the inquisition is no less necessary, if we are to stop the never-ending audacity of elected persons peeping through every keyhole.

Essentially, the case is one in which good precedents must be made by the legislative bodies themselves as the result of the give and take of opposing interests. These good precedents will emerge from the present disorder providing there presides over this conflict of interests a vigilant, disinterested public opinion.

<sup>1</sup> In 1913, when the Underwood Tariff Bill was before Congress, President Wilson is said to have asserted that lobbyists were so thick in Washington 'that one can't throw a brick without hitting one.' Since that time they have greatly increased in number. In his comprehensive and admirable study, *Group Representation before Congress*, Doctor E. Pendleton Herring listed not less than 462 'organizations having representatives in the Capital' in 1929. Between 60 and 100 of these he considers are 'consistently effective. The hundreds remaining may be ruled out as not so significant. Some of them may prove useful to their supporters on occasion, but more often than not they are mere parasites.' He distinguishes the form and methods of the 'new lobby' as compared with the old, studies the activities of the most powerful of the groups represented, appraises the good and the bad features of such representation, and the proposals and laws intended to reform or regulate the lobby. The book is a valuable aid to the study of what Leon Duguit called 'the gravest of problems' — the settling of the relations between the many and powerful private-interest organizations with the Government that exercises public power.



## REFERENCES

- 
- Brown, George R. *The Leadership of Congress*. 1922.
- Luce, Robert. *Legislative Assemblies*. Boston, 1924. 'The Lobby,' 367-99. 'Bribery,' 400-35.
- Herring, Edward P. *Group Representation before Congress*. 1929.
- Logan, Edward B. *Lobbying*. Supplement to *Annals of the American Academy of Political and Social Science*, July, 1929.
- Muller, Helen M. *Lobbying in Congress*, 1931. *The Reference Shelf*, VII, no. 3.
- Odegard, Peter. *Pressure Politics*.
- Wilhelm, Donald. 'The Washington Soviets,' *Forum* (Nov., 1925), 743.
- Lobbying Investigation:*
- Hearings before the 'Caraway Committee,' 1929-30.* Pursuant to S. Res. 20, 71st Congress, 1st and 2d sessions: To investigate the activities of lobbying associations and lobbyists in and around Washington, D.C. 4 volumes. Government Printing Office.
- Lobbying Charges against House Members and Lobby Activities.* 1914. Government Printing Office.
- Alleged Dye Monopoly.* Hearings before a Subcommittee of the Judiciary Committee, 67th Congress, 2d session, S. Res. 77.
- Maintenance of a Lobby to Influence Legislation on the Ship-Purchase Bill.* 1916.



# XI

---

## SENATE INVESTIGATIONS

---



---

★

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the ears, and to embody the wisdom and will of its constituents. . . . The informing function of Congress should be preferred even to its legislative function.

WOODROW WILSON

If the itch for power and partisan malice have been at the bottom of most congressional investigations, they have also been both a salutary force in the direction of good government and a strong support of the investigative function.

GEORGE B. GALLOWAY

The last thing that is desired by the promoters of such an inquiry is the calmness and detachment of a judicial tribunal. There are many Senators to whom an investigation is a colorful political drama.

SENATOR GEORGE WHARTON PEPPER

Government by investigation is not government.

SECRETARY ANDREW W. MELLON

Conversely, government by suppression is government!

SENATOR CARTER GLASS

---

★

# XI

---

## SENATE INVESTIGATIONS

---

---

### LEGAL BASIS FOR INVESTIGATIONS

---

FROM the very first it has been recognized that the Senate must possess certain powers of authoritative investigation. This follows inevitably from the judicial powers delegated to it. Each branch of Congress is made 'the judge of the elections, returns and qualifications of its own members'; each House 'may punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member'; in assigning to the Senate 'sole power to try all impeachments,' the Constitution clearly implied the Senate's power and duty to compel the securing of all testimony needful in the course of such trial.

Hardly a decade had passed when Congress enacted a law which took for granted far more general powers of investigation than are involved in the performance of these judicial functions, for it empowered not only the President of the Senate and the Speaker of the House but also 'the chairman of . . . any committee of either House of Congress . . . to administer oaths to witnesses in any case under their examination.'<sup>1</sup>

#### HOW MAY INVESTIGATION BE MADE?

##### *By the Senate, at its own Bar*

For nearly twenty years it was an open question whether the Senate as a body might not carry forward an investigation. January 21, 1807,

<sup>1</sup> G. P. Furber, *Precedents*, 45. Stat. May 3, 1798, ch. 35, sec. 1, 1 Stat., 554. By a later Act this power was extended to the presiding officer of the Senate for the time being. 19 Stat., 34.

it was moved that a certain architect, Theodore Burr, who had given an opinion as to a pile bridge over the Potomac, should be examined on oath at the bar of the Senate.

This was opposed as improper — as unprecedented in the Senate — as leading to dilemmas — to delay — that it would compel us to hear other witnesses upon a subject within our own view — that we had no rules established for the examination of witnesses.<sup>1</sup>

The Vice-President requested the opinion of the Senate whether the motion was in order. After long debate upon that question, the vote upon it was a tie, and the Vice-President's casting vote decided that the motion was not in order.

*By Senate Resolution, Addressed to Some Executive Agency*

Requests for information from the heads of the several departments are frequent. In most instances the information is promptly supplied, for every department head or chief of a bureau wishes to keep upon good terms with the dominant branch of Congress from which come appropriations and legislation affecting the service for which he is responsible. But not infrequently, especially from the Department of State, comes the reply that the public interest does not at that time permit the divulging of the information sought. In repeated instances the refusal has been by the express instruction of the President,<sup>2</sup> as when President Roosevelt instructed his Attorney-General not to respond to the Senate's resolution 'directing' the Attorney-General to give reasons why he had not instituted proceedings against the United States Steel Corporation for absorbing the Tennessee Coal and Iron Company in alleged violation of the Sherman Anti-Trust Law. The President took occasion to declare:

The heads of departments are subject to the Constitution and laws passed by Congress in pursuance of the Constitution, and to the direction of the President of the United States, and to no other direction whatever.<sup>3</sup>

At times the question has been raised as to the right of the Senate, a single branch of Congress, to direct a bureau or commission to make investigations for its information. The Supreme Court has held:

The clause of the Federal Trade Commission Act, empowering the commission to investigate and report facts as to alleged violation of the

<sup>1</sup> William Plumer, *Memorandum*, 582; *Annals of Congress*, 38. Burr was 'at full liberty to send in a letter or certificate to the Senate explaining his views and conduct.'

<sup>2</sup> Thus, Garland, at President Cleveland's instruction, refused to furnish certain information as to appointments and removals as demanded by a Senate resolution (p. 807).

<sup>3</sup> Theodore Roosevelt, *Autobiography*, 478-79.



Anti-Trust Acts, when directed by either house of Congress, will not support its demand for disclosure of the records of a corporation in an investigation directed by the Senate not based on such an alleged violation. . . .

A governmental fishing expedition into the papers of a private corporation on the possibility that they may disclose evidence of crime is so contrary to the first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in most explicit language.

Held — that access is confined to such documents as are relevant as evidence to the inquiry or complaint before the commission, and that their disclosure cannot be compelled without some evidence of their relevancy and upon a reasonable demand. (*Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298.)<sup>1</sup>

### *By Joint Committees*

Joint committees have occasionally been utilized for the making of investigations. The most notable of these was the Committee on the Conduct of the War, which served as the 'joint inquisition of Congress' in the later years of the Civil War.<sup>2</sup>

### *By Standing Committees*

Extended investigations are often necessarily involved in the tasks of standing committees. For example, contests over the title to seats in the Senate are invariably referred to the Committee on Privileges and Elections. In the Sixty-Ninth Congress the chairman of that committee announced the designation of four subcommittees, to each of which was assigned the preliminary investigation of a contest. Important and opposed nominations are first canvassed in subcommittees, and later passed upon by the entire committee dealing with related matters, before they come before the Senate for confirmation. In the Sixty-Eighth Congress the extended investigation of the naval oil leases was carried on by a subcommittee of the Committee on Public Lands and Surveys.

The competence of such a committee to demand information, for example from the head of an executive department, is a matter which

<sup>1</sup> See nos. 48, 49, and 50. Judgments affirmed upon the authority of *Federal Trade Commission v. American Tobacco Company*. These three affirmations were announced March 16, 1925. (276 U.S. 586.) See press reports, June 19, 1925, of a decision by the Federal Trade Commission to decline to accede to requests from a single branch of Congress that it make investigations not involving anti-trust law issues. Of the then recent Senate resolutions Commissioner Humphrey declared: 'It is clearly apparent that the primal motive in all of them is political.'

<sup>2</sup> Page 313.

has not been clearly determined, some officers attaching slight authority to a request for information that is not backed at least by the authority of the Senate itself, and not merely by that of a committee.<sup>1</sup>

*By Special or Select Committees*

For an inquiry which does not fall within the jurisdiction of any of the standing committees, a select committee is usually constituted. In the early days of the Senate such committees were elected. It was customary to choose the majority if not the entire membership of such committees from Senators favorable to the proposed inquiry. In 1872, at the urgent insistence of Sumner and Schurz, a special committee was elected to inquire into sales of arms to France in apparent violation of neutrality as well as of federal law. The balloting in the Senate produced a committee which included the strongest defenders of the transactions under criticism, but excluded all who had condemned them. When summoned to appear before this committee, Sumner filed a formal protest, declaring that a committee so assorted had no right to sit at all — that by parliamentary law the committee should be made up of those who were friendly to the inquiry, excluding those who were 'against the thing, or who took grounds that there were no facts or reasons justifying the inquiry.'<sup>2</sup> Declaring that this was 'the first time in the history of the world that a witness has assumed to

<sup>1</sup> In a hearing, April 14, 1926, before a subcommittee of the Committee on the Judiciary upon a resolution 'directing' the Attorney-General to give information as to the expenses of the then recent prosecution of Senator Wheeler, and to state whether the Department of Justice planned to institute perjury proceedings against a prosecution witness in that trial, the Attorney-General declined to reply on the ground that publication of the information would be 'incompatible with the public interest.' It had been stated that the Government had been ready to present two witnesses to substantiate the evidence of the alleged perjurer, when the trial came to an end. In the hearing:

Senator Walsh (Chairman of the subcommittee): Will you tell us the names of those two persons?

Attorney-General: Can I, or will I?

Walsh: Can you?

Attorney-General: Yes.

Walsh: Will you?

Attorney-General: No!... Who is charged with the responsibility of instituting proceedings — the legislative or executive branch of the Government?

Walsh: The Department of Justice, I presume.

The Attorney-General declared that he would not furnish the information until the Senate — as contrasted with a subcommittee of one of its standing committees — asked for it. He added: 'I consider it the duty of the Senate to consider very gravely whether it intends to ask such a question. I can't ignore what I consider my duty.' *Boston Herald*, Associated Press dispatch, April 14, 1926.

<sup>2</sup> Sumner cited sec. XXVI of Jefferson's *Manual*, and an opinion of former Speaker R. M. T. Hunter. E. L. Pierce, *Memoir and Letters of Sumner*, IV, 510 ff.; Sumner's *Works*, XV, 45-60.

impeach the capacity of the judge on the bench to examine him,' the chairman of the committee moved that the protest be returned to Sumner, as disrespectful to the committee. But on a later day that motion was withdrawn.

In 1924, a sharp contest developed over the method by which a special investigating committee should be chosen. Wheeler introduced a resolution, directing the Committee on the Judiciary to investigate the failure of the Attorney-General (Daugherty) to prosecute or defend certain criminal and civil actions wherein the Government was interested.<sup>1</sup> Some days later he modified the resolution so as to provide that the investigation be carried on, not by the Committee on the Judiciary, but by 'a committee of five Senators, consisting of Senators Brookhart, McLean, Jones (Washington), Wheeler, and Ashurst' — not one of whom was a member of the Committee on the Judiciary, to which a resolution of such tenor would ordinarily have been referred.<sup>2</sup> Lodge at once protested against this naming of the investigating committee by the mover of the resolution, declaring it to be 'entirely new in the practice of the Senate . . . never before, either under Democratic or Republican control, have I known a reflection of this kind cast upon the Presiding Officer of the Senate.'<sup>3</sup> He offered an amendment that the committee's members 'be appointed by the Chair.' Spirited debate followed, in which attention was directed to the Senate rule requiring that not only all standing committees, but 'all other committees shall be appointed by ballot unless otherwise ordered,' a rule which Lodge declared had been more honored in the breach than in the observance. While acknowledging that the mover of a resolution for an investigating committee had often been named by the Presiding Officer for membership upon it, Bruce asked: 'But did the Senator ever know the mover of a resolution to suggest his own name as a member of a committee of investigation, in a case where bitter, malignant, partisan feeling was involved, and he had taken an active part in the controversy?'<sup>4</sup> Upon report that the President *pro tempore* did not wish to be entrusted with the appointment of this committee, Lodge withdrew his amendment. After some outside maneuvering, Wheeler agreed that the committee

<sup>1</sup> Jan. 13, 1924, S. Res. 157.

<sup>2</sup> Jan. 19, 1924, *Cong. Rec.*, 2769.

<sup>3</sup> Feb. 29, 1924, *ibid.*, 3299.

<sup>4</sup> La Follette later inserted in the *Record* a series of precedents in which investigating committees had been named directly by the Senate or elected by ballot. The resolution was adopted March 1, 1924, by a vote of 66 to 1. See *Record*, p. 3410, and press reports of March 1, for requests of the two lawyers engaged by Daugherty to defend him.



should be elected by the Senate, three members of the majority party and two of the minority, and that the resolution's provocative and question-begging preamble should be withdrawn. La Follette then nominated the 'insurgent' Republican, Brookhart, as member and chairman; the majority leader named Jones (Washington) and Moses; the minority leader named Wheeler and Ashurst. Without a record vote, all of these nominees were forthwith elected. With a single exception the committee's personnel was the same as the five originally named by Wheeler. But the Senate had 'saved its face'.<sup>1</sup>

#### POWER TO COMPEL WITNESSES TO APPEAR AND TESTIFY

---

For nearly sixty years this power to examine witnesses under oath in Senate investigations seems to have been exercised without direct challenge. In 1857, however, John W. Simonton, having refused to answer questions put to him by a House investigating committee, was arrested and brought to the bar of the House, 'to answer as for a contempt of the authority of this House.' The House declared his excuse for his contempt to be insufficient, and ordered that he be continued in close custody by the Sergeant-at-Arms 'until he should have purged the contempt upon which he was arrested, by testifying before said committee.'<sup>2</sup> Hardly forty-eight hours had passed after

<sup>1</sup> S. Res. 162. March 11, 1924, *Cong. Rec.*, 5377. Two years later, in 1926, when the Senate passed a resolution calling for an investigation of the Tariff Commission, no attempt was made to take from the Presiding Officer the naming of the members of the special committee. But the resolution was so amended as to stipulate that of its five members two should be members of the minority and three should be 'members of the majority, and include one who is a progressive Republican.' It was generally assumed that this stipulation was intended to ensure the appointment of Norris, an 'insurgent,' who had persuaded the Senate to enlarge the scope of the proposed committee's inquiry so as to include the President's alleged attempts to exert pressure upon the Tariff Commission. But, avoiding the delicate task of discriminating as to which of the 'insurgents' were 'progressive Republicans,' Vice-President Dawes named the only member of the Senate who in the *Congressional Directory* had classified himself as 'Republican (Progressive),' Robert M. La Follette, its youngest member. This Senate resolution is said to be the first official action by which the insurgent Republicans have been recognized by name as 'Progressive Republicans,' a separate party group. *Outlook*, March 24, 1926, 437.

<sup>2</sup> Furber, *op. cit.*, 46-50. Simonton remained in such custody for nearly three weeks before he was finally discharged, having made satisfactory answers to the committee.

Simonton thus stood at the bar of the House, when a bill had been passed by both the House and the Senate and approved by the President, which declared that a person, summoned to appear as a witness before either House or one of its committees, who should willfully default or refuse to answer any question pertinent to the question under inquiry, should be held 'guilty of a misdemeanor punishable by a fine of from one hundred to one thousand dollars and imprisonment in the common jail from one to two months.'<sup>1</sup> This statute stands today practically unchanged. Upon report being made to the Senate that a witness has failed to testify, the President of the Senate may certify the fact under the seal of the Senate to the District Attorney of the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

The Senate's first attempt to impose penalties upon a recusant witness under this law was made in 1860. For failure to appear and to testify before the Senate's select committee appointed to investigate John Brown's insurrection at Harper's Ferry, Thaddeus Hyatt, a Negro, was arrested by the Sergeant-at-Arms under warrant issued by the President of the Senate, and brought to the bar of the Senate, 'to answer as for a contempt of the authority of the Senate.' His replies proved unsatisfactory, and by resolution of the Senate he was committed by the Sergeant-at-Arms to the common jail of the District of Columbia, there to be kept in close custody till he should signify his willingness to testify. Apparently he remained in prison for more than three months and was finally released only after the select committee of investigation had been discharged.<sup>2</sup> Less successful was the Senate's

<sup>1</sup> For law as to congressional investigations, see Code of 1926, ch. 6, 12. Later legislation denies to any witness before a Senate or House committee the privilege of refusing to testify or to produce any paper, upon the ground that his so doing would 'tend to disgrace him or otherwise render him infamous.' (R.S. 101 to 104.) But, on the other hand, no testimony thus given shall be used as evidence against him in any court, except in a prosecution for perjury committed in giving such testimony. An official paper or record produced by him is not, however, within the same privilege. (R.S. 859.)

<sup>2</sup> Furber, *op. cit.*, 52-55. For debate over his discharge, see *Cong. Globe*, 3006-07, June 15, 1860.

In discussing the Hyatt case, Sumner argued against the power of the Senate to punish him for refusal to testify, contending that this would be an exercise of the judicial power granted to the Senate for exercise only in case of impeachment, the discipline of members, and in contests over qualifications and election. Fessenden, on the other hand, argued thus:

Now, what do we propose to do here? We propose to legislate upon a given set of facts, perhaps, or under a given necessity. Well, Sir, proposing to legislate, we want information. We have it not, ourselves.... How are we to get it? The Senator says, 'Ask for it!' I am ready to ask for it; but suppose the person whom we ask will not give it to us — what then? Have we not the power to compel him to come before us?

(Sumner, *Cong. Globe*, 36th Cong., 1st sess., 3006-07; Fessenden, *ibid.*, 1102.)  
See Eberling, Ernest J., *Congressional Investigations*, 161-67.

attempt to penalize Frank B. Sanborn for refusal to appear before that same committee. After resistance to a deputy of the Sergeant-at-Arms, Sanborn was arrested. But, on writ of habeas corpus, his discharge was ordered by the Supreme Court of Massachusetts on the ground that his arrest was illegal, since the warrant issued to the Sergeant-at-Arms did not authorize him to delegate to another his authority to effect the arrest.<sup>1</sup> The Senate abandoned its efforts to compel Sanborn's attendance.<sup>2</sup>

In 1876 the Supreme Court of the United States rendered a decision in the case of *Kilbourn v. Thompson* which has been cited in all more recent controversies over the power of a committee to compel testimony. After Kilbourn had been luxuriating in jail for some five weeks<sup>3</sup> by order of the House for having refused to give to one of its committees the names of the members of an alleged real-estate pool or to produce its records, on writ of habeas corpus he was brought before the Supreme Court of the District of Columbia. Although the Sergeant-at-Arms there made careful return of the writ, setting forth that Kilbourn was in his custody by virtue of an adjudication of the House of Representatives finding him guilty of contempt of its authority, the judge forthwith ordered that Kilbourn be delivered into the custody of the Marshal for the District of Columbia.<sup>4</sup> Kilbourn then brought action against the Sergeant-at-Arms and the Speaker for false imprisonment, in which he was successful.<sup>5</sup> Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States in this case, as the best 'expression of the true principle on this subject' in which the Court fully concurred, cited the language of Mr.

<sup>1</sup> *Sanborn v. Carleton*, 16 Gray, 399. For a spirited account of this episode, see *Sanborn's Recollections of Seventy Years*, I, 208-23.

<sup>2</sup> In the fifteen years following the end of the Civil War, in several cases — most of them in investigations by the Committee on Privileges and Elections — witnesses, who at first had refused to testify, a few days after arrest appeared before the committee, answered its questions, and thereby purged their contempt and won their discharge. See summaries and references in *Furber, op. cit.*, to cases of *Edward E. Dunbar* (1867), *Enos Runyon* (1877), *Conrad N. Jordan* (1877), and *J. V. Admire et al.* (1879), pp. 58; 68; 69, and 71. See the debate, Jan. 8, 1877, in the Senate ending in the vote of 35 to 3, declaring that William M. Turner, manager of the Western Union Telegraph Co. at Jacksonville, Ore., was 'in duty bound, under his oath, to answer the questions' asked him by the Committee on Privileges and Elections as to certain dispatches alleged to have been sent over the wires in regard to the election of 1876. *Cong. Rec.*, 476-77.

<sup>3</sup> For comment on this farcical imprisonment, see *David S. Barry, Forty Years of Public Life*, 125, and *Furber, op. cit.*, 65.

<sup>4</sup> *Furber, op. cit.*, 63-67.

<sup>5</sup> *Ibid.*, 74-75, *Kilbourn v. Thompson*. Damages amounting to \$20,000 were ultimately awarded to Kilbourn against the Sergeant-at-Arms. The Speaker and the four Representatives were held not to be responsible in this false imprisonment.



Justice Hoar in a precisely analogous case in the Supreme Court of Massachusetts — a statement which was concurred in by all the members of that court.<sup>1</sup>

The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers, and tribunals in the Commonwealth.... The House of Representatives has the power under the Constitution to imprison for contempt, and the power is limited to the cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from these constitutional functions and to the proper performance of which it is essential.

Having cited these words from the Massachusetts decision, Mr. Justice Miller continued:

In this statement of the law, and in the principles there laid down, we fully concur.

We must, therefore, hold... that the resolution of the House of Representatives finding Mr. Kilbourn guilty of contempt, and the warrant of its Speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter.

In effect the opinion was thus set forth that the Constitution confers neither upon Congress nor upon either branch thereof a general or unlimited power to imprison for contempt, 'but that its right in this respect is confined to the recalcitrance of witnesses in those few cases where it has a judicial grant — contested elections, impeachments, and misconduct of its own members' — and, it may be added, to those cases where the testimony is essential for the performance of its legislative functions.<sup>2</sup>

<sup>1</sup> *Burnham v. Morrisey*, 14 Gray, 266. In claiming that there was no power to punish the Representatives who were on the committee, the Court applied the clause of the Constitution which provides, as to members of Congress, that 'for any speech or debate in either House, they shall not be questioned in any other place,' to a committee session held anywhere within the domains of the United States.

<sup>2</sup> L. G. McConachie, *Congressional Committees*, 83-84, and n. 1; 103 U.S. 168; F. J. Goodnow, *Comparative Administrative Law*, II, 269.

Other cases of the period before 1900 as to the competence of Congress, or of either House to imprison for contempt are *Anderson v. Dunn*, 6 Wheat., 204; *The People v. Kuler*, 99 N.Y. 463, 478.

For discussion of the refusal of witnesses to answer questions of Senate investigating committees in 1924 and later, see pp. 519 ff.

This exceedingly important case, *Kilbourn v. Thompson*, is fully analyzed, in its various aspects, by Ernest J. Eberling, in his elaborate study of *Congressional Investigations*.

See, also, Marshall E. Dimock, *Congressional Investigating Committees*, 131-36.

Often those whose testimony is most essential as to the matters under investigation are themselves members or officers of one or the other branch of Congress. To compel such testimony would seem in the nature of a breach of parliamentary privilege. However, a member of the Senate rarely fails to comply with a request that he appear and testify before a Senate committee.<sup>1</sup>

Jefferson's *Manual* declares:

Either House may request, but not command, the attendance of a member of the other. They are to make the request by message to the other House, and to express clearly the purpose of attendance, that no improper subject of examination may be tendered to him.<sup>2</sup>

Thus, by resolution of April 2, 1808, the Senate requested that three members of the House be permitted to testify 'as to the characters of sundry witnesses in the case of John Smith, a Senator from the State of Ohio.'<sup>3</sup> January 27, 1819, in compliance with a request from the House, the Senate gave leave to two Senators to attend a committee of the House, to be examined upon matters mentioned in that request.<sup>4</sup> But it has been made evident in the Senate that any enforced or voluntary attendance of a Senator before a House committee, to be examined upon any question relating to an impeachment trial,<sup>5</sup> would be considered as highly improper.

When an officer of the Senate is summoned to appear before a House committee, he does so only upon leave from the Senate.<sup>6</sup> In similar fashion permission is sought for the transmission to the Senate of testimony that has been given before a House committee.<sup>7</sup>

<sup>1</sup> In 1872, in response to a special committee's request, Charles Sumner appeared, but only to read a protest; the committee then ordered his presence by a subpoena. He again protested, but, waiving 'his rights,' submitted himself to examination. E. L. Pierce, *Memoir of Charles Sumner*, IV, 510-13; Sumner's *Works*, XV, 45-60.

<sup>2</sup> Sec. XIII. Reference is to practice in Parliament.

<sup>3</sup> Senate *Journal*, 259.

<sup>4</sup> *Ibid.*, 195.

<sup>5</sup> Buckalew's resolution, May 27, 1868, was not acted upon, but was significant of Senate feeling. *Ibid.*, 422.

<sup>6</sup> Such permission was given to an assistant doorkeeper, June 27, 1832, to attend as witness before a House committee, 'agreeably to his summons' (*ibid.*, 370); and to the Secretary of the Senate, Dec. 28, 1842, to present certain papers from his official files in the Circuit Court of the District of Columbia; and, June 7, 1878, to submit to a House committee the papers for which it had called. Furber, *op. cit.*, 81-82.

<sup>7</sup> Request to the House for a copy of testimony, taken before a House committee, relating to a member of the Senate. *Ibid.*, 82.

For standing orders relating to oaths, examinations, and payments of witnesses, see Senate *Manual*, 1934, 115-18.

The first session of the Sixty-Eighth Congress (December 3, 1923, to June 7, 1924) was the period during which the Senate was more distraught by investigations than ever before in its history. One of the most significant features of that record is the frequency with which the investigations were balked by the refusal of witnesses to answer questions or to produce papers; in less than as many months, five several witnesses flouted the authority of the Senate by bluntly refusing to testify upon demand of one of its committees.

Although Albert B. Fall, the former Secretary of the Interior, had twice appeared and testified before the committee investigating the naval oil leases, February 2, 1924, he refused to answer further questions, contending, first, that the authority given to the committee by the Senate in the previous Congress had expired; and, second, that inasmuch as Congress had directed the institution of court action in the oil leases, any answer he now should make might tend to incriminate him. On advice of counsel, the investigating committee is said to have decided to abandon further efforts to examine him, on the ground that possible immunity might make successful prosecution in the courts, if ordered, doubtful.<sup>1</sup>

March 22, 1924, Harry F. Sinclair by advice of counsel refused to answer questions put to him by the Senate investigators of the naval oil leases, on the ground that Congress had already referred to the courts for determination the entire matter under investigation by the committee. Senator Walsh, the committee's 'prosecutor,' announced that there were two courses open: (1) to have the President of the Senate certify the case to the District Attorney for the District of Columbia for grand-jury proceedings, or (2) to bring Sinclair to the bar of the Senate and commit him to the custody of the Sergeant-at-Arms until he was ready to answer. He said that if the latter course were chosen, Sinclair could probably obtain liberty on a writ of error, and then the case would have to be fought out in the courts. Accordingly, by a vote of 71 to 1 the Senate adopted a resolution, March 24, 1924, declaring Sinclair to be 'in contempt of said committee and of the Senate,' and certifying the case to the District Attorney for the District of Columbia. A week later the grand jury returned an indictment against Sinclair, each of its ten counts referring to questions which he had refused to answer in the committee's hearings. In the

<sup>1</sup> July 20, 1931, Albert B. Fall, after a long series of legal contests, was committed to the New Mexico state penitentiary to serve a year and a day on conviction of having received a bribe of \$100,000 to negotiate a lease of federal naval oil reserves while he was Secretary of the Interior. So ended a struggle of seven years!



District of Columbia Supreme Court, May 3, 1924, the case was argued before Associate Justice Hoehling. Reviewing similar cases in which the United States Supreme Court had considered questions of jurisdiction,<sup>1</sup> he ruled, in effect, in favor of the existence of a Senate committee's power to compel pertinent testimony in aid of the exercise of the legislative functions of Congress, excluding self-incrimination. He overruled Sinclair's demurrer and motion to quash the indictment. The counsel both of the Government and of the defense, as well as Mr. Justice Hoehling, emphasized the desirability from every standpoint that a ruling be made by the Supreme Court of the United States, to set a definite precedent in such matters. December 31, briefs were presented to the District Court of Appeals. Sinclair's counsel contended that, by the Senate's adopting the resolution which declared the oil leases void, its committee was deprived of further jurisdiction in the matter under investigation, and therefore had no longer any right to examine witnesses or demand the production of documents pertaining to the oil leases, and insisted that the power of Congress to compel testimony existed only in the few specific instances before cited. He declared:

An attempt to utilize the powers of the Senate to conduct what amounts to a 'fishing expedition' for evidence, or what amounts to an examination before trial with relation to suits of the Government, both civil and criminal, against the witness, is an outrageous perversion of such functions.

He held that an innocent man might well refuse to testify upon the ground that his testimony would tend to incriminate him, 'as evidence may have a tendency to incriminate, though there be no actual guilt.' After an interval of more than two years — an astonishing and unexplained instance of 'the law's delay' — the Court of Appeals of the District of Columbia rendered its opinion, holding that four of the ten questions were pertinent, and Sinclair was presently (March 7, 1927) put on trial before a jury in the Supreme Court of the District of Columbia for his contempt of the Senate in his refusal to answer those four questions of its committee. The familiar arguments were again rehearsed, but the jury found him guilty, and he was sentenced to serve three months in the District of Columbia jail and to pay a fine of five hundred dollars. An appeal was noted immediately. Nearly a year later this appeal was argued before the District of Columbia Court of Appeals. On request from this court that the

<sup>1</sup> E.g., *Kilbourn v. Thompson*, 103 U.S. 168. (1880.)

Supreme Court of the United States answer five questions for its guidance, the Supreme Court issued a rule agreeing to pass on all phases of the case. Thus the whole record of Sinclair's refusal 'on advice of counsel' to answer the Senate committee's questions came before the Supreme Court of the United States for review. April 8, 1929, came the decision, declaring:

The gist of the offence was refusal to answer pertinent questions. . . . The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and section 102 made it the defendant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense.

The conviction on the first count must be affirmed.<sup>1</sup>

Accordingly, more than five years after his offense was committed, and after every appeal and delay that a multimillionaire's astute counsel could interpose had proved unavailing, May 6, 1929, Sinclair began to serve his sentence in jail for contempt of the Senate in refusing to answer pertinent questions asked him by a Senate committee.<sup>2</sup>

<sup>1</sup> In *Family Quarrels* (1931), 165-70, ex-Senator Pepper, commenting on the Sinclair decision, expresses the opinion that, had the justices who decided *Kilbourn v. Thompson* been called upon to deal with the Sinclair case, they would have assented to Sinclair's proposition that the Senate committee and the Senate itself had exhausted its mandate by referring the question to the courts. He adds: 'A witness will in practice get very little comfort from the assurance that he need not answer any questions except such as are "pertinent to the matter under inquiry." . . . The Senate or the House, by the mere assertion of a legislative purpose, may authorize its committee to go far beyond a search for such information as is likely to be useful in framing new legislation and many bring about the punishment of the witness who declines to appear or answer questions in the course of the investigation. . . . Either of the Houses of Congress may inquire into and supervise the conduct of anybody and everybody in the Executive branch of the Government from the President all down the line. . . . There is not much left of the protection accorded to private rights by the *Kilbourn* case.' In effect, he interprets the court's conclusion in the Sinclair case, as meaning: 'The judiciary had better keep hands off the Congressional investigations!'

<sup>2</sup> Before he had completed his term of three months, Sinclair was again a loser in his last appeal, and for criminal contempt of the Supreme Court of the District of Columbia in seeking to 'bribe, intimidate, and influence' the jurors in the Teapot Dome conspiracy case he was sentenced to six months in jail.

Sinclair was not the first man to serve a sentence in jail for contempt of the Senate in refusing to answer questions of one of its committees. In 1896, the Senate created a special committee with full power to investigate newspaper charges that Senators were yielding to corrupt influences in the consideration of tariff legislation pending in the Senate, with many amendments the adoption or rejection of which would materially affect the market value of stock of the American Sugar Refining Company. Elverton R. Chapman, a New York broker, in a hearing before this committee, was asked whether his firm had bought or sold 'sugar stocks' for any Senator in March, April, or May, 1894, and whether the firm was then holding any such stocks in the interest of any Senator. He 'wilfully refused to answer each of the questions so propounded, all of which were pertinent to the inquiry then being made,' and his sentence to thirty days

March 24, 1924, Clarence C. Chase, Fall's son-in-law, refused to answer any questions before the committee investigating the oil leases on the ground that he might incriminate himself. Since, following Fall's example, he stood upon his constitutional ground, the committee decided not to propose court action.<sup>1</sup>

When a resolution was first introduced in the Senate asking the President to call for the resignation of Attorney-General Harry M. Daugherty,<sup>2</sup> he at once sent an open letter to an Ohio Senator, urging him to use his best efforts to secure authority for a committee to conduct a hearing, 'in fairness to everybody,' and declaring, 'I am prepared at any moment, after those pressing this resolution have been heard, to lay the whole matter before such committee.'<sup>3</sup> No sooner had the committee been constituted to investigate the conduct of Daugherty as Attorney-General than every member of it received a statement from the counsel whom he had engaged for his defense, saying: 'By direction of the Attorney-General it is our pleasure to advise you that in the conduct of your investigation of the Department of Justice every agency and facility of that department is at your service.'<sup>4</sup>

After some preliminary hearings in the Capital, the committee transferred its activities to Washington Court House, Ohio, where information was sought as to certain suspicious-looking financial

in jail and a fine of one hundred dollars was affirmed, and the penalties inflicted in 1897. *In re Chapman*, 166 U.S. 661.

At the hearing before the committee, Chapman was asked by the chairman whether Senator W. V. Allen had had dealings in sugar stocks with that firm during those months. He declined to answer. Then Allen, who was a member of the investigating committee, announced his identity, and gave him full liberty and personally requested him to testify 'if I have had any dealings with his firm in any stocks during that period?' When Chapman declined to answer, Allen declared, 'I am going to take you through the list of those names,' and the same question was put to him as to the entire list of members of the Senate in alphabetical order. Each member of the committee made specific request that he testify. Said C. K. Davis, 'Do you wish to put me in the position of appearing to have speculated in sugar stocks through your firm?' to which Chapman replied: 'I do not. I simply decline upon general principles.' *Cong. Rec.*, 6143-46, June 12, 1894.

<sup>1</sup> Two days later his resignation was accepted as collector of customs at El Paso, Texas. The House of Representatives' Judiciary Committee failed to act on the Senate's resolution contemplating impeachment proceedings as a result of his refusal to answer questions of the oil committee. In the Senate Walsh severely criticized President Coolidge because he did not 'ignominiously dismiss' Chase from office immediately after testimony had been given before the committee to the effect that he had attempted to suborn perjury in behalf of Fall. *Cong. Rec.*, 5009.

<sup>2</sup> S. Res., 137.

<sup>3</sup> Letter to Senator Willis, Feb. 10, 1924.

<sup>4</sup> Some months later he told the Ohio State Bar Association that one of the 'outstanding acts' of his administration had been his refusal 'to surrender the confidential files of the Government upon demand of an unauthorized, red-controlled, so-called "investigating committee" of the United States Senate.' Press reports of July 10, 1925.



operations of the Attorney-General. The committee had sent an accountant in advance to examine the books of the Midland National Bank, of which Mally S. Daugherty, brother of the Attorney-General, was president. On the first day the accountant had been allowed to examine the cancelled certificates, President Daugherty assisting him, but the next day he was told that he could not continue that search. When the committee came and began its hearings, local witnesses for whom subpoenas had been issued failed to appear, but four lawyers presented themselves as representing President Daugherty and the bank, and their spokesman announced their wish 'to question the jurisdiction of the committee to examine the books of the bank or to call witnesses in connection with the bank.' He declared that President Daugherty declined to appear in answer to a subpoena, or to produce any records of the bank, or its deposit slips and certificates. While this hearing was in progress the sheriff thrust into the hands of the Senators injunction papers, signed by a probate judge, restraining them from interfering in any way with the Midland National Bank.<sup>1</sup>

A few weeks later, armed with a warrant signed by the President *pro tempore* of the Senate, the Senate's Deputy Sergeant-at-Arms arrested Mally S. Daugherty for contempt in failing to appear in response to its committee's subpoena, but within a few hours Daugherty was allowed his liberty upon a writ of habeas corpus, under personal bond of five thousand dollars by Federal Judge Smith Hickenlooper.<sup>2</sup> May 31, 1924, Judge A. M. J. Cochran, of the United States District Court at Cincinnati, permanently discharged Mally S. Daugherty from the custody of the Senate's Deputy Sergeant-at-Arms. In his opinion:

The power of the Senate to investigate the Attorney-General's office or any department of the Government to the fullest extent is not involved here. What the Senate is engaged in doing is not investigating the Attorney-General's office; it is investigating the former Attorney-General.<sup>3</sup> What it has done is to put him on trial before it. In so doing it is exercising the judicial function. . . . The Senate, in its action, has usurped judicial power and encroached on the prerogative of the House

<sup>1</sup> It was questioned whether this probate judge — a former partner of Attorney-General Daugherty — had any right to issue such an order in a case that was not pending in his court. A local attorney, who was asked some question as to the injunction, declined to be sworn or to answer. Press report, April 11, 1924.

<sup>2</sup> Daugherty's counsel held that the committee, which had caused Daugherty's arrest charged with contempt of the Senate, was without power to summon witnesses, a purely judicial function. The case of *Marshall v. Bob Gordon* and other precedents were cited.

<sup>3</sup> Daugherty had already resigned, at the President's request.

of Representatives, should this investigation have been based on intent to institute impeachment proceedings against the Attorney-General.<sup>1</sup>

When charges were first presented in the Senate against Attorney-General Daugherty, he had urged that a hearing be held, and professed his willingness to answer all charges.<sup>2</sup> But his mood had now changed. March 27, 1924, at the President's request, he had resigned. May 2, upon Daugherty's petition, Justice Stafford of the Supreme Court of the District of Columbia issued temporary orders to the managers of the Western Union Telegraph Company and the Postal Telegraph Cable Company to prevent them from surrendering, at demand of the investigating committee, by *subpoena duces tecum* 'all private telegrams of Harry M. Daugherty, both incoming and outgoing, for the past three years'; and the Senators upon that committee were cited to show cause why an injunction should not be issued to prevent them from insisting upon the surrender of these private telegrams. There was no adjudication in these cases, for it was stipulated between counsel that the subpoena should not be enforced pending a further hearing of the case; and before the case was heard upon the merits the Senate committee defendants withdrew the subpoena, and made that fact known to the court.<sup>3</sup> Though a hearing was held in the fall of 1924 on the motion of the committee to dismiss the bill of complaint, no decision was ever handed down. The court doubtless considered the controversy for practical purposes moot by the withdrawal of the subpoena.

Two days before the date on which Daugherty had been asked to come before the investigating committee for the first time, his counsel read to the committee his statement (June 4, 1924) declaring:

<sup>1</sup> Cincinnati dispatch to *Washington Post*, dated June 1, 1924.

<sup>2</sup> Page 522. In his petition Daugherty maintained that should the telegraph companies obey the subpoena, 'it would be violative of and contrary to the guarantee and protection granted, given and afforded him' by the Fourth and Fifth Amendments of the Constitution of the United States, and he insisted that the subpoena was of no legal effect and was void for the reason that it 'is uncertain and indefinite and does not lawfully or at all describe any particular incoming or outgoing message or telegram so that the same may be identified as the law requires in all *subpoenas duces tecum*.'

<sup>3</sup> In the opinion of counsel for the plaintiff and for the Western Union Telegraph Company, the fact of the withdrawal was never appropriately communicated to the court. A memorandum on behalf of the telegraph company, filed early in April, 1924, stressed the contentions: (1) Investigation of conduct of executive officials is not, in the first instance, within the constitutional powers of the Senate; (2) to compel the production of private papers by unwilling witnesses is beyond the literal import of the Senate's resolution; (3) the subpoena is unreasonably broad. (Paul E. Lesh, Attorney for Western Union Telegraph Company, in letter to the writer, Feb. 9, 1931.)

Judge Cochran holds squarely that your committee has been and is now exercising a power not granted by the Constitution, expressly or by implication, and that each and all of your actions under Senate Resolution No. 157 are absolutely void. In view of this decision and in obedience thereto, it seems to me to be a vain thing to continue an illegal proceeding and inquiry, and I must therefore decline to appear before your committee. . . . The decision of the court above referred to has changed the whole situation and rendered it unnecessary for me to appear before your committee in person or by counsel, and their attendance at your hearings will be discontinued from and after this date.

Meantime the Senate had indulged in a heated debate, resulting in the passage, under suspension of the rules, of a resolution requesting Attorney-General Stone, 'using counsel satisfactory to the investigating committee,' to appeal to the Supreme Court from the decision of the Federal Court in Cincinnati, releasing Mally S. Daugherty on a writ of habeas corpus after he had been taken into custody in pursuance of a Senate subpoena.<sup>1</sup> Arguments were heard on that appeal before the Supreme Court December 5, 1924. On behalf of the appellant, the Deputy Sergeant-at-Arms of the Senate, it was contended that the investigation ordered by the Senate, in connection with which Mally S. Daugherty's appearance and the production of the books of the Midland National Bank were required, was within the power possessed by each House of Congress to conduct an investigation in aid of its legislative function; that the Senate's power to compel the attendance of witnesses in aid of legislation is not dependent on the concurrence of the House of Representatives,

<sup>1</sup> June 5, 1924, *Cong. Rec.*, 10644-49. Only two Senators, Pepper and Spencer, voted against this resolution, the former basing his opposition upon an unwillingness to bring about a conflict between the judicial and legislative departments of the Government. Senator Pepper's views upon 'Congressional Power to Compel Witnesses to Testify' were vigorously set forth in an address before the Maryland Bar Association, June 28, 1924, stating what he believed to be the real issue in the M. S. Daugherty and H. F. Sinclair contempt cases then pending, as follows:

The ultimate question in both cases is the power of the Senate to compel the production of evidence where the Senate is not discharging the constitutional function of trying an impeachment or of determining its own organization or the qualifications or conduct of its own members, and where there has been no misbehavior in its presence but merely disobedience on the part of an outsider to a command to testify. . . .

It is important that we lawyers should be aware of the contention that there is also a supervisory and visitatorial power in Congress apart from the power of impeachment, and a power to compel private citizens to disclose everything short of incriminatory matter with no limitation upon the *ipse dixit* of Senate or House. . . .

If it is held that the power exists, and if public opinion supports the decision, we may look for frequent exercise of the power — ostensibly in aid of legislation, but actually to accomplish political purposes.

Among other important discussions of the issue, in anticipation of its determination by the Supreme Court are: C. S. Potts, in *University of Pennsylvania Law Review*, May and June, 1926; J. M. Landis, *Harvard Law Review*, December, 1926, 'Constitutional Limitation on the Congressional Power of Investigation.'



and that it may be exercised directly by the Senate, and not only through a court; that the Deputy Sergeant-at-Arms was duly qualified to execute the warrant in the case at bar, and that the injunction of the Fayette County Court afforded no excuse for Mally S. Daugherty's disobedience to either subpoena.<sup>1</sup>

In opposing the appeal, Mally S. Daugherty's counsel held that the investigation was judicial in character, and beyond the jurisdiction of the Senate; that the Senate does not possess the power of arrest as an arm of its legislative authority, but that Congress alone — not one branch of Congress, and certainly not a committee of such branch — can have power to compel testimony in aid of Congress in the enactment of laws; that, if the Senate has any power to arrest, its warrant must issue upon probable cause, supported by oath or affirmation. It was also insisted that to compel the production of the books of the Midland National Bank was barred by the injunction issued by the Fayette County Court of Common Pleas; and that the Senate did not confer upon its Sergeant-at-Arms any power to delegate his authority to make the arrest.<sup>2</sup>

More than two years intervened before the Supreme Court rendered its decision. January 17, 1927, their unanimous opinion was presented by Mr. Justice Van Devanter. When first subpoenaed, Mally S. Daugherty had been directed to appear before the Senate committee as a witness and to bring certain books and papers of his bank.<sup>3</sup> He refused to come to Washington. In a second subpoena, with which the subcommittee went to Ohio, all reference to the books and

<sup>1</sup> In this case (as contrasted with that of *Sanborn v. Carleton*, p. 516 and n. 1), the Senate resolution had distinctly provided for the issuance of a warrant commanding 'the Sergeant-at-Arms or his deputy' to effect the arrest, and McGrain had been formally empowered for this service. Former Attorney-General George W. Wickersham and William T. Chantland were the special assistants to the Attorney-General. The above statement is summarized from their briefs.

<sup>2</sup> Summarized from the brief of A. I. Vorys, attorney for Mally S. Daugherty, in *John J. McGrain, Appellant, v. Mally S. Daugherty, Appellee*, U.S. Supreme Court, October Term, no. 596. More than a year later, when these same papers of the Midland National Bank were wanted in the investigation of the American Metals Company case, Mally S. Daugherty testified before the grand jury that he had given the particular ledger sheets and other documents to his brother, 'who wanted to look over certain matters — mostly politics — and see where he stood,' that they had never been returned, and that he understood that they had been burned.

<sup>3</sup> Cited into court, Jan. 22, 1926, because of his refusal to answer certain grand-jury questions as to those papers on the ground that he might incriminate himself, Harry M. Daugherty was ordered to reply, and then admitted that he had received those papers from his brother, and that he no longer had them. He made no explanation why he, the former Attorney-General of the United States, had destroyed the pages of greatest value for the investigation then in progress. Associated Press reports of Jan. 22, 1926; editorial, *Boston Herald*, Jan. 29, 1926.

papers was omitted. When he again refused to appear, the Senate's resolution holding him to be in contempt made no reference to books and papers. The Supreme Court, therefore, found that the question before it had been narrowed to that of the power of Congress, or of a committee acting for one branch of Congress, to compel witnesses to appear and testify, and that there was no occasion to pass upon the power of Congress or of a committee to compel witnesses either to answer specific questions or to produce books and papers at the committee's demand. The gist of its decision was as follows:

There is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute [the power of inquiry, with enforcing process].

[Before and when the Constitution was framed and adopted] the power of inquiry with enforcing process was regarded and employed as a necessary and appropriate attribute of the power to legislate — indeed was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised. . . .

Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

Specifically the Court declared: that

Daugherty had wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the District Court erred in discharging him from custody. *McGrain v. Daugherty*, 273 U.S. 135-82.<sup>1</sup>

The decision insisted that the demand for the witness's presence or testimony must be for a purpose that could be in aid of legislation. It left open for court construction the pertinency and legitimacy of specific questions asked of witnesses.<sup>2</sup>

Although the Supreme Court thus decided against Daugherty and

<sup>1</sup> Reprinted, with comment, in *Cong. Rec.*, 1766-72, Jan. 17, 1927.

<sup>2</sup> On this issue the Sinclair case went to the Supreme Court (p. 521). Attention was at once called to momentous consequences which this decision may involve:

The new decision introduces another element in the system of checks and balances in the American constitutional structure, and enables a minority party to prosecute through the powers of Congress those cases in which the Department of Justice for political or other reasons might seem negligent . . . A subpoena from congressional committees now will mean more than it ever has before. While for the time being it may mean a recrudescence of the investigating fever, the check against abuse will be the power of public opinion at the polls.

David Lawrence, Washington dispatch, Jan. 18, 1927.

in favor of the Senate, nothing was ever done about it. The session of Congress had ended, some members of the committee were out of the Senate, and the object of the investigation really lapsed, as far as the Senate was concerned, by the expiration of time.<sup>1</sup> But this important Supreme Court decision led to the bringing to book of several other witnesses who were persisting in recusancy toward an entirely distinct Senate investigating committee.

As a sequel of the Supreme Court's decision in the *M. S. Daugherty* case, on a single day, February 14, 1927, there were again summoned before the Reed 'Slush Fund Committee' in Chicago four men who had previously refused to answer the committee's questions as to campaign expenditures in the 1926 senatorial primary contests in Illinois and Pennsylvania.<sup>2</sup> Samuel Insull, described in the press as 'the biggest single-handed utility magnate in the world,' now admitted that the sums he had before reported to the committee fell far short of the total of his contributions in that campaign. That total, he now declared, was \$237,925, including \$40,000 paid to 'three or four persons' whose names both he and his attorney, Daniel J. Schuyler, refused to disclose.

State's Attorney Robert E. Crowe now purged himself of his contempt to the Senate by giving answers satisfactory to the committee. The fourth witness, Thomas W. Cunningham of Philadelphia, again refused to answer what was the source of the \$50,000 aggregate contribution which he, a clerk of general sessions on a salary of \$8000, had made to the treasurer of the Vare organization in the primary campaign. Insull refused to tell what was done with his contribution; Cunningham refused to tell the source from which his contribution came. Of the Insull episode, Senator Norris said in the Senate:

Nothing has ever been done about it. He committed a crime when he refused to answer the first time; he committed a crime again, when he refused to answer the next time.

The Cunningham case, on the other hand, dragged on for years. Both procedures, open to the Senate, were brought into service in regard to this recalcitrant witness. Soon after he flouted the committee the second time, under the Senate's warrant its Deputy Sergeant-at-Arms arrested him. After being in custody hardly half an hour, he was released on bail. But the judge in the Federal District Court

<sup>1</sup> Statement by Norris, in Senate, April 26, 1928, *Cong. Rec.*, 7235-37.

<sup>2</sup> Page 537, n. 1 and 2.



ruled the Senate had the power to arrest him and hale him before its bar for questioning. Upon Cunningham's appeal, the Circuit Court of Appeals ruled in his favor, whereupon the Senate ordered an appeal from this decision to the Supreme Court, which held (May 29, 1929) that the Senate was well within its rights in issuing a warrant for Cunningham's arrest and directing its Sergeant-at-Arms to bring him to its bar for questioning. In accordance with this unanimous decision he was remanded to the Senate's custody, and was again arrested, only to be at once released under bond to await 'the pleasure of the Senate.' In the meantime, the Senate ordered the United States Attorney in Washington to prosecute Cunningham on the criminal charge of contempt of the Senate committee. He was indicted, and in the District Court the ruling was against him, but — as in the other procedure against him — the Circuit Court of Appeals ruled in his favor. While the case was in the Supreme Court of the United States on appeal, in August, 1931, Cunningham died. For three years and a half this recusant witness had been fighting off trial for his contempt of the Senate in refusing to answer its committee's questions.

By order of the Senate, February 2, 1928, Robert W. Stewart, chairman of the board of the Standard Oil Company of Indiana, was arrested by the Sergeant-at-Arms because of his refusal to answer questions of the Teapot Dome Committee as to his knowledge of what became of certain bonds.<sup>1</sup> Hardly thirty minutes before the hour set for him to be brought to the bar of the Senate to answer for his contempt, a writ of habeas corpus was secured in his behalf. His lawyers contended that his arrest for the purpose of haling him before the bar of the Senate was illegal; that the Senate committee's questions related to 'purely private matters in which the Senate could have no concern,' and that the answers sought 'could not possibly assist the Senate in matters of legislation.' The presiding judge, on the other hand, held that the grounds on which Stewart had refused to testify were 'frivolous and without legal basis,' and insisted that when the latest resolution was passed 'it may be assumed that the Senate had in mind the possibility of the need of further

<sup>1</sup> Stewart, Harry M. Blackmer, and James E. O'Neill were among the oil men who were alleged to have guaranteed a deal by which the Continental Trading Co., Ltd., of Canada bought and then resold to Sinclair and the Premier Oil interests 33,000,000 barrels of Texas oil at an advance of 25 cents a barrel. The Government charged that Fall received more than \$230,000 in Liberty bonds from this deal, as the result of granting the Teapot Dome lease to Sinclair.

legislation,' and that 'the Senate is not necessarily controlled by the action of the courts in similar cases.' Accordingly he discharged the writ, and remanded Stewart to the custody of the respondents. An immediate appeal was noted.

While this appeal was pending, March 2, 1928, an entirely distinct process was started against Stewart: He was indicted by a grand jury for the violation of section 102 of the criminal statutes, which provides that refusal of a duly subpoenaed witness to answer pertinent questions before a Senate or House committee is a misdemeanor punishable by fine (one hundred to one thousand dollars) and imprisonment (one to twelve months). To this charge he pleaded not guilty, and twenty days were allowed to the defense for preparation of its case.<sup>1</sup>

Before that time had elapsed, he again appeared before the Teapot Dome Committee, and at the outset agreed to reply to the question addressed to him, and he then told in detail of his connection with the bonds in question. Two days later, when the chairman of the committee moved for the vacating of the order for bringing Stewart before the bar of the Senate, in view of the fact that he had answered the committee's questions, there was much debate as to the right of the committee to receive his answers, when he had already been cited to appear before the Senate itself. The motion was passed, after it had been amended to include a statement that the Senate 'insist upon the prosecution of Mr. Stewart for the offense that he committed against the United States' and a provision that a copy of the commit-

<sup>1</sup> Similar to the 'recusancy' cases of Sinclair and Stewart was that of Dr. Francis E. Townsend. May 21, 1936, Dr. Townsend, a duly summoned witness before a special committee, authorized by the House of Representatives to 'investigate Old-Age Pension Plans,' refused to answer certain of its chairman's embarrassing and not too pertinent questions, and without permission stalked out of the room. Upon the committee's report of this occurrence, the House voted to certify the matter to the United States District Attorney, for prosecution. In the district court he was convicted and sentenced to pay a fine of \$100 and serve 30 days in jail. The Circuit Court of Appeals affirmed his conviction. His petition of certiorari was denied by the United States Supreme Court. In the absence of a pardon from the President, he must serve his sentence. But on the last day of grace, when he presented himself at the court house for commitment to jail, there was produced a notification from the White House, that the Speaker, the majority leader of the House and the chairman of the affronted committee had recommended clemency, and that 'therefore the President has pardoned Dr. Townsend.' In this denouement satisfaction could be claimed by all, and political embarrassments avoided. The White House announcement declared: 'The authority, the dignity and the rights of the House of Representatives have been fully sustained by the conviction.' The chairman of the committee asserted that the committee and the House had been fully vindicated. Dr. Townsend, waving his pardon, hailed it as a 'complete vindication' for himself. 'The President, as spokesman for Congress, has performed an act of contrition in acknowledging my mistreatment.'

tee's report be transmitted to the District Attorney with a view to his determining whether Stewart should not be 'presented to a grand jury for indictment on the charge of perjury.' During the debate the Chairman of the Committee on the Judiciary declared:

While he has undoubtedly committed perjury, we have just had an illustration — and not the only one either — that it is almost an impossibility to convict a man of a crime if he makes a stealing that is big enough.<sup>1</sup>

When Stewart came to trial, May 21, 1928, Justice Siddons of the Supreme Court of the District of Columbia, upholding a demurrer of the Government filed against Stewart's petition to have the case thrown out, since he had subsequently answered the committee's questions, ruled that he must stand trial on the charge of violating section 102 of the criminal statutes. In the ensuing trial there were read transcripts from the committee's records at its hearings which declared that a quorum of the committee was present and quoted statements made by Stewart as to the bonds. In court Stewart now denied that he had made the statement that he had 'never personally received any of those bonds,' but acknowledged saying that he 'had not profited from any of them.'

His counsel laid great stress on the contention that the *Congressional Record's* report of roll-calls indicated that at the hearings in question three less than a quorum had been present. Senator Norris, as a Government witness, testified that it was the customary practice for members to be included in the quorum count in committees when they had so requested by telephone, provided the members present did not object. The judge held that the minutes of the assistant clerk of the committee, showing a quorum present when Stewart refused to answer, were unimpeachable. But the verdict was given for acquittal.

Some ten days later (June 25, 1928) Stewart was indicted on a charge of perjury because of the contradiction between his statements made in court and in the committee's hearings. A decisive factor in this case seems to have been the presiding judge's instructions to the jury to consider first of all whether there was a quorum of the committee present at the hearings when Stewart gave certain testimony and refused to answer certain questions. He ruled that before a Senate committee can become valid, a majority of its members must be actually and physically present. With a majority present at the

<sup>1</sup> April 26, 1928, debate, *Cong. Rec.*, 7235-39.



outset, he said, one or more might withdraw without impairing the validity of the session, unless a specific point of a lack of a quorum should be raised. He told the jury to settle the quorum question first of all, and, if it was agreed that these requirements were not fulfilled, the jury need go no further, but return a verdict of acquittal at once. Under these instructions, the jury brought in a verdict of acquittal.<sup>1</sup> Upon this outcome, Senator Norris commented:

Under the instructions given the jury, it could have rendered no other verdict. I think the judge's interpretation of law is wrong. If it is right, ninety-five per cent of all state and national legislation would be nullified. All the legislatures in the civilized world operate without physical quorums. Unless there was a fight on, he (this judge himself) probably was not confirmed by a quorum, and therefore under his interpretation he is not a judge. Such decisions have made our jurisprudence the laughingstock of the civilized world.

When the Senate committee sought to secure testimony from two other men, Harry M. Blackmer and James E. O'Neill, who with Stewart were alleged to have been involved in the Continental Trading Company deal, they fled the country. After letters rogatory had been issued, they appeared before a court in France, but refused to testify. An attempt was made to secure Blackmer's extradition on charge of perjury in connection with a federal income-tax statement, but the French Government declined to recognize that offense as one upon which extradition could be claimed. Balked in these efforts, Congress, upon the initiative of Senator Walsh of Montana, passed an Act Relating to Contempts, which provided for court contempt sentences upon American citizens residing abroad who refuse to answer court summonses when served by an authorized representative of the United States.<sup>2</sup> Under this Act bonds belonging to Blackmer in the sum of \$100,000 were seized by a United States Marshal and held in

<sup>1</sup> Nov. 20, 1928, press dispatch.

Promptly after the publication of Stewart's court testimony, which convinced many Senators that he had 'undoubtedly committed perjury,' John D. Rockefeller, Jr., wrote to Stewart demanding that he should not stand for re-election as chairman of the board of the Standard Oil Company of Indiana. Stewart persisted in running for that office. There followed a vigorous campaign to control proxies. The directors stood by Stewart, and, shortly before the annual meeting, declared an extra dividend. Stewart was defeated, but by a stock vote largely determined by the holdings of the Rockefellers and of the institutions which they dominated. The result would have been different had the decision been by vote of stockholders as individuals, for to a majority of the directors, of the employees, and of the stockholders of the company 'efficiency,' as evidenced by the declaration of extra dividends, seemed to outweigh presumptive perjury.

<sup>2</sup> Act approved July 3, 1926. For debate on this bill, with special reference to the Blackmer case, see *Cong. Rec.*, Feb. 1, 1926.

a safety-deposit vault to meet the \$60,000 in fines which had been assessed upon him as a recusant witness. February 15, 1932, in a unanimous opinion read by Chief Justice Hughes, the validity of the Walsh Act was sustained. Every point raised by Blackmer's counsel was swept aside. It was held that, though he went to France, he remained an American citizen, subject to this country's laws, and 'for disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States.' May 24, the bonds which had been seized under the Walsh law were given over to Blackmer's counsel, on receipt of \$60,000 in payment of the fines for his contempt of court.<sup>1</sup> O'Neill, who also made his escape to Europe to avoid giving testimony in the Teapot Dome investigation, after years of evading process-servers who sought to subpoena him back to the United States, died in exile in August, 1931.

In 1935, the United States Supreme Court clearly asserted the power of the Senate to punish private citizens for contempt.<sup>2</sup> In pursuing its inquiries, the Special Senate Committee Investigating Ocean and Air Mail Contracts had subpoenaed all papers bearing on such contracts in the files of William P. MacCracken, Jr., a former Assistant Secretary of Commerce for Aeronautics who had resigned and become an aviation attorney. Appearing before the committee, MacCracken, pleading the confidential relations between attorney and client, declined to deliver the papers without the consent of his clients. He was ordered to secure such permission, but before this was accomplished, without his knowledge or consent, his partner had given several clients access to his files, from which a number of documents were removed. Some of these were torn up by L. H. Brittin, vice-president of Northwest Airways. These acts were reported by the committee to the Senate, which thereupon adopted

<sup>1</sup> On the same day there was received from Blackmer's counsel the sum of \$3,669,784.47 in a compromised settlement of the civil income-tax claim against him. But no settlement was made of the criminal charges against him. It was announced that if he returns to the United States he will be prosecuted under indictment in the Federal Court of Colorado, charging evasion of income taxes. May 16, 1935, Denver dispatches reported that each year action is taken to keep the Blackmer case subject to prosecution.

<sup>2</sup> In August, 1935, Sergeant-at-Arms Jurney was sent on another chase for an elusive witness, H. C. Hopson, head of the Associated Gas and Electric System, whose testimony was wanted by the Senate committee investigating lobbying in connection with the pending Holding Companies Bill. At the same time the chairman of a House committee, investigating those lobbying activities from a different angle, was hunting for Hopson. Remembering the jail sentence which had come to MacCracken and Brittin for contempt of a Senate committee, Hopson contrived to be discovered first by the House hunters, but he later appeared before the Senate committee, and testified to the expenditure of \$800,000 to defeat that particular bill.

a resolution, February 5, 1934, 'that the President of the Senate issue a citation directing' MacCracken and three of his clients 'to show cause why they should not be punished for contempt of the Senate' on account of the destruction and removal of these papers. Armed with a Senate warrant, Sergeant-at-Arms Journey set out to look for MacCracken, but failed to find him for several days. Saturday evening MacCracken appeared at Journey's residence and demanded to be arrested. As the warrant directed that the prisoner be brought immediately before the bar of the Senate (which was not then in session), Journey declined to effect the arrest. MacCracken refused to leave, so Journey allowed him to remain as an uninvited though not unwelcome week-end guest. At the home of a justice of the Supreme Court of the District of Columbia, MacCracken had already secured a writ of habeas corpus, and the following Monday morning he appeared before the same justice, maintaining that he had been 'arrested,' but the court held that this was a misrepresentation of the facts, and imposed a fine of one hundred dollars for this 'contempt,' in claiming in the writ of habeas corpus that he had been 'held in bodily restraint' by the Sergeant-at-Arms. Hardly had he paid this fine when he was arrested and, with his three clients, brought before the bar of the Senate. The ensuing 'trial' was behind closed doors (February 12-14), but soon after its conclusion the Senate's votes were made public. By a majority of 62 to 22 the Senate had determined to carry through this trial at its own bar instead of referring the cases to the United States District Attorney — the course which had been pursued in the Sinclair case.<sup>1</sup> The two defendants, who had at once returned the documents to the committee, were acquitted and discharged, but by votes of more than two to one MacCracken and Brittin were found guilty, and each of them was sentenced to ten days in jail. Brittin, tired of fighting, at once served his term, but MacCracken again appeared before the same justice of the Supreme Court of the District of Columbia, claiming that the Senate lacked power to punish him for an offense that was not continuing, since substantially all the papers demanded — even the fragments retrieved from Brittin's wastebasket! — had been delivered to the committee long before his arrest and the proceedings to punish him. But the court held that the Senate had not exceeded its powers, and ordered that MacCracken be turned over to the Sergeant-at-Arms. Five months later the United States Circuit Court of Appeals reversed this decision; three of its five justices held:

<sup>1</sup> Page 519.



Unless there is to be an intermingling of the legislative and judicial power to deal with contempt, thereby rendering it possible in all cases as a matter of legislative power summarily to try one thus accused without subjecting him to the statutory modes of trial provided for criminal offenses, protected by the limitations and safeguards of the Constitution, then we must and do declare that the Senate is without jurisdiction to inflict punishment on the petitioner under Senate Resolution 172.<sup>1</sup>

The two dissenting justices asserted that the Senate's power to punish in this case was implied as a means of procuring information in aid of legislation. In editorial comment the point was stressed that the great and growing importance of legislative investigating committees made the issue in this case of vital interest to the public, since it raised the question of danger of legislative usurpation of judicial powers.

An appeal was taken to the Supreme Court. February 4, 1935, the opinion of the Court was delivered by Mr. Justice Brandeis. In effect it reversed the decision of the Court of Appeals, and held that Congress — as well as the courts — has power to punish for contempt. It asserted that the power of Congress to punish a private citizen for contempt, though limited to acts which are of a nature to obstruct legislative process, may be exerted, notwithstanding the fact that the obstruction has been removed, or that its removal has become impossible; that the power of Congress to punish for contempt has not been impaired by the statute under which refusal to answer or to produce papers before either House or its committees constitutes a misdemeanor; and that the United States Senate has power to punish an attorney for contempt because of destruction or removal of papers from his files after service of subpoena to appear before a Senate investigating committee and to bring papers relating to the case pending, as against the contention that a client has removed some of the papers without the attorney's knowledge or consent and that substantially all of the papers removed had been recovered and delivered to the committee.<sup>2</sup>

As a result of this decision MacCracken forthwith began to serve his ten-day sentence in jail, imposed by the Senate, not by a court. The announcement of this fact led to an angry debate in the Senate. Austin, a member of the Airmail Investigating Committee, insisted that MacCracken was a 'private citizen whose inviolable rights had been taken from him by the Senate.'<sup>3</sup>

<sup>1</sup> July 9, 1934.

<sup>2</sup> *Jurney v. MacCracken*, argued Jan. 7-8, 1935. No dissenting opinion.

<sup>3</sup> *Cong. Rec.*, 2731-35, Feb. 28, 1935.

## SENATE INVESTIGATIONS OF CAMPAIGN EXPENDITURES

## IN SENATORIAL CAMPAIGNS

It has often devolved upon the Senate, in determining the validity of a claimant's title to a seat, to investigate expenditures made in his election. But the prelude to a new investigational activity of the Senate is found in a resolution introduced by Norris, September 16, 1914, providing in most sweeping terms for investigation by the Committee on Privileges and Elections of expenditures in the primaries recently held in Illinois and Pennsylvania and in the elections of candidates nominated in those primaries — the report of its findings and testimony taken, and its recommendations, to be made as soon as practicable after the general elections to be held November 3, 1914. Challenged to point out the law which authorizes the Senate to enter upon the investigation of 'a mere candidate' before the certificate of election of such person is presented in the Senate for acceptance or rejection, Norris replied:

While I do not know whether it is contrary to the precedents of the Senate, it seems to me perfectly proper, if the Senate sees fit, to investigate primaries at which nominations are made.

His resolution was referred to the Committee on Privileges and Elections, from which it never emerged.<sup>1</sup>

Twelve years later a similar proposal secured much more serious consideration. In the spring of 1926 frequent press dispatches indicated that especially in these same states, Illinois and Pennsylvania, unprecedented sums of money were being expended in the senatorial primary campaigns. The very day after those primary elections were held, the Senate agreed to a resolution, empowering a special committee of five to investigate

what moneys, emoluments, rewards, or other things of value have been promised, contributed, made or expended by any person, firm, or corporation, or committee, organization or association, to influence the nomi-

<sup>1</sup> *Cong. Rec.*, 15198. This was not the first time that the Senate had found occasion to investigate expenditures in primary campaigns. See discussion of the cases of Stephenson and Newberry (pp. 135-37; 137 ff.).

nation or election of any person as a member of the United States Senate at the general election to be held in November, 1926 . . . [This committee was to] sit and act at such times and at such places as it may deem necessary.<sup>1</sup>

In the entire history of the Senate there have been few special committees which have held such widespread interest. For, not only did its disclosures result in the exclusion from the Senate of two claimants bearing credentials valid in form and certifying that they had been duly elected by the qualified voters of the second and third — as to population and wealth — states of the Union (Illinois and Pennsylvania), but in the course of its work this committee brought to the test in the Senate and in the courts a surprising range of questions as to the powers and the procedure of Senate committees and of the Senate itself.<sup>2</sup>

Promptly after the adjournment of Congress the committee began to function in the investigation of the primary campaigns recently held in Pennsylvania and Illinois.<sup>3</sup> Public hearings were held in Washington. Subpoenas were served upon the managers and other officers of Republican campaign organizations active in the Pennsylvania senatorial contest. The three candidates (Governor Pinchot, Senator Pepper, and Representative Vare) were invited to appear, but were not subpoenaed because of the high offices which they were then holding. The committee encountered many difficulties and delays. Wilson, the Democratic contestant for the seat claimed by Vare, in his petition to the Senate charged fraudulent and unlawful practices in connection with Vare's nomination and alleged election. It seemed necessary to impound the ballots which had been used, and

<sup>1</sup> S. Res. 195. Introduced by Reed (Mo.), April 8, 1926; agreed to, by vote of 59 to 13, May 19. It is significant that throughout its long history this committee was almost universally referred to as the Reed 'Slush Fund Committee.'

<sup>2</sup> By terms of the resolution, the five members appointed by the President of the Senate, were to consist of three from the majority party 'of whom one shall be a progressive Republican,' and two members from the minority party. When it began its work its members were: James A. Reed, Chairman; Goff, McNary, La Follette, and King. Aside from investigating the facts relating to these campaign expenditures the committee incidentally brought into keen discussion questions of the continuity of a committee's service, of its control over recusant witnesses, and of the procedure of the Senate in dealing with a Senator-elect, against whom serious charges in the campaign seem to have been proved by committee investigation, before he presents himself to take oath. It is to be noted that the resolution, under which the committee was acting, in effect set at naught the contention, which had been so stressed in the Newberry case, that the Senate was a judge, not of the nomination (primary), but only of the 'election' of its members.

<sup>3</sup> One of the first surprises disclosed was the extent to which members of the Senate and House were on the pay-roll of organizations like the Anti-Saloon League, making campaign speeches in the several states. David Lawrence, in press of June 18, 1926.



the Senate agreed to another resolution empowering the committee 'to take possession of and preserve all ballot-boxes . . . used in the said election contest.'<sup>1</sup> A fortnight before the expiration of the Sixty-Ninth Congress, Chairman Reed introduced a resolution specifically providing for the committee's continued existence during the interval between March 4 and the convening of the new Congress, and until December 30, 1927. In debate he said that it was 'highly probable' that the select committee had the power to continue its investigations during the recesses of Congress, but that it was usual to pass a resolution of this kind to remove all doubt as to the committee's having such power.<sup>2</sup> This resolution led to protracted debate on the long-controverted questions whether the Senate is a 'continuing body,' and, if so, whether by virtue of that fact and without express authorization a Senate select committee has power to function beyond the term of the Congress during which it was created.

Although Reed of Pennsylvania had declared on the floor of the Senate that both he and Vare would 'very gladly co-operate in the impounding of these ballots,' he now filibustered against this resolution so persistently and effectively that the Sixty-Ninth Congress came to its final adjournment without having expressly authorized the continuance of this committee. After the session had ended, he at once took the position that this committee 'has, in my opinion, no authority whatever at the present time.' The expiration of Congress left the status of the committee a matter of serious doubt. The President of the Senate, Dawes, who had appointed the committee, at once issued a statement that the Supreme Court's recent decision in the case of *McGrain v. Daugherty* 'conclusively' proved that this select committee continued to exist after the adjournment.<sup>3</sup> Borah, citing the same decision, declared his opinion that the committee 'has the power to go ahead and complete its work, and that no power can be interposed to prevent that except an affirmative resolution . . . ending the power of the committee.'<sup>4</sup> On the other hand, Fess, who had been appointed to fill a vacancy on the committee, believing that 'heretofore select committees of either Senate or House created for

<sup>1</sup> Feb. 17, 1927, S. Res. 364.

<sup>2</sup> Feb. 24, *Cong. Rec.*, 4644.

<sup>3</sup> *Washington Star*, April 10, 1927. Cited by C. C. Tansill, in a comprehensive study, 'The Smith-Vare Case and Its Relation to Senate Procedure,' *National University Law Review* (May, 1928), 3-42; 22. By issuing this statement and by making an appointment to fill a vacancy on this committee, Dawes lined himself up with the Democrats and Republican 'liberals.'

<sup>4</sup> Tansill, *op. cit.*, 23.

service during a Congress have ceased to exist at the conclusion of the Congress,' not only declined the appointment, but, as a member of the Committee to Audit and Control the Contingent Expenses of the Senate, he joined with its chairman in taking the position that there was no authority 'for that committee to approve expenditures of the special investigating committee.'<sup>1</sup> With this warning in mind, the Senate's Sergeant-at-Arms, who had been instructed by the Senate to attend this committee and to 'execute its directions,' now declined to spend money advanced from the personal funds of the Chairman, Reed, to carry out the committee's order for subpoenaing witnesses and the taking possession of books, papers, and ballot-boxes.

Undaunted by these refusals of funds and service, the committee continued to hold meetings after the adjournment of Congress. When delivery of the ballot-boxes was refused, the committee's representative and attorney brought suit in the United States District Court of the Eastern District of Pennsylvania to compel delivery.<sup>2</sup> The respondents' contention was that this select committee 'ended its existence on March 4, when the Senate adjourned.' In concluding a long opinion, Judge Thompson dismissed the case 'for want of jurisdiction,' declaring 'the case depends upon the determination, not of a judicial but of a legislative question.' In effect he intimated that the Senate itself would have to determine whether its committee was alive or dead. An appeal was at once taken, and in November the Circuit Court of Appeals, Third Circuit, sustained the opinion of the lower court and its decree was affirmed by the Supreme Court.<sup>3</sup> Thus was brought to naught, for the time being, not only the attempt to secure the ballot-boxes, but also the unprecedented effort of a Senate committee to get from the courts a 'determination of the question of the committee's own powers and continued existence.'<sup>4</sup> The very next day, however, the Senate agreed to a resolution (No. 262, May 29, 1928):

<sup>1</sup> Tansill, *op. cit.*, 23.

<sup>2</sup> Ballot boxes from Philadelphia and Allegheny Counties had already been delivered, at request of the committee. The controversy in the courts arose over the demand for the election paraphernalia from a few other counties, where charges of fraud had been made.

<sup>3</sup> It held: 'The context, the established practice of the Senate to rely on its own powers, and the attending circumstances oppose the construction for which the petitioners contend and show that the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not "authorized by law to sue." Decree affirmed.'

<sup>4</sup> For citations from briefs and from these court decisions, see Tansill, *op. cit.*, 23-28.

That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law.

Promptly upon the convening of the Senate in the Seventieth Congress, Chairman Reed introduced a resolution declaring that the original resolution by which the Senate had created this committee, and all subsequent resolutions to which the Senate had agreed relating to it, 'have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.'<sup>1</sup> Reed of Pennsylvania at once protested that the series of resolutions had not 'continued in full force and operation,' inasmuch as the special committee (by grace of his own filibuster, he might have claimed) had not been specifically continued by any resolution, but 'had died with the adjournment of the Sixty-Ninth Congress.' Chairman Reed led the debate in favor of the resolution, which was agreed to by a vote of nearly three to one.<sup>2</sup> Thus, by formal resolution 'the Senate decided the very question with which it had plagued the courts during the long interval between the sessions of Congress; the activities of the committee during the recess were approved, and its continued existence was asserted.'<sup>3</sup>

That this committee was not able to make final report upon its tasks within three years of the time of its appointment was due to causes beyond the control of its members and of its indefatigable chairman.<sup>4</sup> Its reports covered campaign expenditures in five states — Arizona, Illinois, Oregon, Pennsylvania, and Washington.<sup>5</sup> Its disclosures of conditions attending the Pennsylvania and Illinois primaries and elections were so convincing that by large votes the Senate denied the oath to the men who presented themselves as Senators-elect from those great states. By its part in setting this new and, it may prove, revolutionary precedent; by its assertion of the continuity of a select committee until its task is accomplished; and by its maintenance of the Senate's dignity and authority in

<sup>1</sup> S. Res. 10. Introduced Dec. 9, 1927.

<sup>2</sup> Dec. 12, *Cong. Rec.*, 489. Vote, Yeas, 58; Nays, 21.

<sup>3</sup> Tansill, *op. cit.*, 3.

<sup>4</sup> Page 145, n. 2.

<sup>5</sup> Reports: In 69th Congress, no. 1197: part 1, Ill.; part 2, Penn., Ore., Wash.; part 3, Ariz.; part 4, Expenditures; Recalcitrancy of Witnesses. In 70th Congress, no. 92, Frank L. Smith; no. 1858, Vare.



dealing with recalcitrant witnesses, the work of this committee will exercise a lasting influence upon the Senate's development.<sup>1</sup>

In April, 1930, a resolution was passed by the Senate providing for the appointment of a special committee of five Senators to investigate expenditures by or in behalf of candidates before senatorial primaries or conventions and in the general election of 1930. Upon that committee no Senator was to serve who came from a state in which a Senator was to be chosen at that election. Great latitude was accorded to the committee, to 'act upon its own initiative and upon such information as in its judgment may be reasonable and reliable.' Senator Nye of North Dakota became chairman of this committee.<sup>2</sup>

In the primary contests of the following month aspirants for Senate seats from Illinois and Pennsylvania maintained the leadership in lavish expenditures. Mrs. Ruth Hanna McCormick exhibited at hearings of the Nye committee account-books and vouchers showing expenditures of more than \$300,000 in behalf of her candidacy, but she insisted that there was nothing reprehensible in this, inasmuch as the objects for which the money had been paid were legitimate.<sup>3</sup> She gave great publicity to charges that detectives in the employ of the Nye committee had broken into her private premises, ransacked her personal correspondence, pilfered her files, and tapped her telephone wires. In defense against such alleged abuses she acknowledged having employed a detective agency to shadow members of the committee, and in a public statement asked: 'What is Senator Nye going to do about it?' With the two Democrats upon the committee he issued a sweeping denial of her charges, and threatened suits for malicious libel against her and against any newspapers later reiterating them.<sup>4</sup> Not a little adverse comment was aroused by the committee's refusal to hear a statement by the Attorney-General of Illinois which sought to present the evidence that the committee had set its employees to wire-tapping and espionage.

Mrs. McCormick was the first woman to win a nomination for the

<sup>1</sup> Against the protest of the retiring chairman, J. A. Reed, this committee's powers were extended to cover an investigation of charges of irregularities in Kean's securing the Republican nomination for Senator from New Jersey in 1928. Feb. 22, 1929, McNary, the new chairman, reported that the charges were wholly unwarranted. *Cong. Rec.*, 4007; 4391.

<sup>2</sup> April 10, 1930, *Cong. Rec.*, 6841-42.

<sup>3</sup> More than \$252,500 of this amount came from her own private funds; \$67,000 additional were contributed by others.

<sup>4</sup> Dale had no part in this Chicago investigation. Patterson insisted on reserving judgment on the whole question of espionage till he could examine the record completely.

United States Senate, but the victory was an empty one, for at the polls she was defeated by a vote of more than two to one. At a September hearing one of her lieutenants declared to the Nye committee, 'You have disrupted our whole campaign.' In later months similar complaints were heard in the Southern States.<sup>1</sup>

In Pennsylvania the Nye committee's attention was mainly focused upon the rivalry between Senator Grundy and Secretary of Labor Davis for the Republican nomination. As in 1926, the senatorial and gubernatorial candidates ran in teams, and the Davis-Brown ticket defeated the Grundy combined ticket in the primary contest, and Davis then won the election by a vote of nearly three to one.<sup>2</sup> At the opening of the new session of Congress, December 2, 1930, Nye demanded that the oath be withheld from Davis, and that his credentials be referred to the Nye committee in order that it might inquire into new reports as to expenditures in the primary campaign. He presented a partial report asserting that the primary expenditures for the Davis-Brown ticket would be 'well over \$600,000.' He declared his personal conviction that more than \$1,000,000 had been spent in that primary campaign.<sup>3</sup> But his resolution was rejected by a vote of two to one, half of the 'coalitionists' and many Republicans voting for the immediate seating of Davis.<sup>4</sup>

In Nebraska and in Massachusetts the Nye committee's investiga-

<sup>1</sup> In justifying the spending of such large sums Mrs. McCormick told the committee: 'In my campaign I had to make an appeal to approximately 3,000,000 voters, scattered over 102 Illinois counties.' The 'County Budgets' alone cost over \$107,000. She criticized the vagueness of the law, particularly as to the period which should be covered by the expense statements. One of her opponents, she said, had never formally announced his candidacy, although he had been organizing and campaigning two years in advance. She advocated legislation restricting the amount which candidates could use, and requiring accounting not only of money spent but of patronage promised, and the use of pay-rollers in canvassing the district.

<sup>2</sup> Kistler (Dem.), 503,449; Davis, 1,372,778.

<sup>3</sup> See S. Rept., 20, Dec. 2, 1931, *Cong. Rec.*, 977; for committee's recommendations, 977.

<sup>4</sup> Three months later the committee's report declared its opinion that the 1930 Pennsylvania primary expenditure was 'excessive and inimical to the public interest, whether such sums were expended on behalf of one candidate or a group of candidates in any primary election,' and could not be permitted 'without most serious consequences to the nation.' But in a minority report one member declared that Davis was 'lawfully chosen and elected' and that 'there was no evidence before the committee which could in any manner affect the qualifications of Senator Davis as a member of the Senate of the United States.' The committee's final estimate was that for the Davis-Brown ticket in the primary and the election campaigns there was spent \$1,117,649.29, of which \$622,928.39 was spent in the primary contest alone. For the Grundy ticket in the primary \$332,076 was contributed, \$291,000 of it by Grundy himself. Bohlen, the 'wet' candidate for the Senate, reported that the contributions for the Bohlen-Philips ticket approximated \$200,000. March 3, 1931, *Cong. Rec.*, 6954.

tions were concerned less with alleged excessive expenditures than with the auspices under which certain preposterous candidacies were launched.<sup>1</sup> In Tennessee, Delaware, and Colorado the committee made some superficial investigations of charges based on slight evidence. From Southern States as well as from Illinois came the complaint that the Nye 'investigations,' carried on between the primary and the election, were in fact 'interference, supervision and domination' of the election, hearings being timed so that innuendoes and unproved charges might be broadcast with maximum effect in biasing the voters.

Throughout the period of this committee's activities the chairman's oft-repeated charge was that campaign expenditures were grossly 'excessive'; but the committee did not present convincing recommendations as to how the limitation of expenditures should be prescribed. In 1930 by a vote of more than two to one Davis was allowed to take the oath, although Newberry had practically been forced out of the Senate and Smith and Vare had been refused the oath because of primary campaign expenditures involving far less money than was spent in behalf of the Davis-Brown ticket in the Pennsylvania primary. What is an 'excessive expenditure' in the attempt to win a senatorial nomination or election? Federal legislation is still challenged as to its applicability to congressional primary elections; state laws are not uniform; court decisions are inconsistent. There was weight in Newberry's contention, that the campaign in Michigan against Henry Ford was 'no ordinary campaign,' and in Mrs. McCormick's statement that she had to carry her campaign to three million voters. Asked by the Nye committee where the line of maximum campaign expenditure should be drawn, Candidate Grundy replied that he would not draw any line. He thought that laws limiting campaign expenditures were illogical, so long as the money was spent for purposes that were legal — for educating the electorate.<sup>2</sup>

<sup>1</sup> In Nebraska, a certain George W. Norris, small-town grocer, filed his name for the primary contest, apparently at the instigation of certain Republican politicians who hoped through confusion of names to bring about the defeat of Senator George W. Norris who was up for re-election. See S. Rept. 1824, 71st Cong., 3d sess., 1930, *Cong. Rec.*, 6451-57, Feb. 28, 1931. In Massachusetts the senatorial candidacy of 'Bossy' Gillis — ex-prize-fighter, gasoline proprietor, mayor of Newburyport — was an object of suspicion. His negligible vote may have determined the election (p. 1080).

<sup>2</sup> Former Solicitor-General James M. Beck maintained that the real question as affecting the regularity of a primary election is 'not how much was spent, but the manner of its collection, and, even more important, the manner of its disbursement.' That problem, he insisted, is for the states, citing the case of John Wilkes. *The Vanishing Rights of the States*.



The amount of money required merely to send a printed postcard to every Republican voter in New York or Pennsylvania or Illinois would be a scandalously large amount to expend in a senatorial campaign in North Dakota, Montana, or Idaho.<sup>1</sup>

In 1932 a resolution was introduced providing for the appointment by the Vice-President of a special committee of five Senators to investigate campaign expenditures of presidential, vice-presidential, and senatorial candidates in connection with the primaries and elections of that year.<sup>2</sup> It was reported favorably from the Committee on Privileges and Elections, but with an amendment to reduce its appropriation from \$100,000 to \$50,000. It was then referred to the Committee to Audit and Control the Contingent Expenses of the Senate, from which it was reported back with an amendment to reduce its appropriation to \$25,000. Norris and others protested, insisting that so small an appropriation for a committee, whose work

<sup>1</sup> In its report, to indicate the need for stringent regulation of campaign expenditures the Nye committee instanced the following:

Expenditures in contests for senatorial nominations in 1930, \$5,505,712.

Expenditures in the presidential campaign of 1928:

For Republican nomination (Hoover), \$395,254; election, \$9,433,604.

For Democratic nomination (Smith), \$152,622; election, \$7,152,511.

In comment upon such expenditures, Senator Cutting declared: 'Four-fifths of the money now expended in a national campaign is not merely wasted, but actually spent to the public detriment.'

The Nye committee's elaborate recommendations included the following:

That congressional supervision be extended to presidential campaigns and to congressional primaries.

That a permanent joint committee on elections be established to supervise campaigns and receive and make public reports of expenditures.

That expenditures be limited as follows:

For presidential nomination, \$250,000; election, \$5,000,000.

For senatorial nomination, \$50,000; election, \$50,000.

For representatives' nomination, \$10,000; election, \$10,000.

That each individual candidate be made responsible for all sums spent in his behalf, either by his agents or by committees; and that every expenditure of over \$10 be reported, accompanied by a receipted bill. Legitimate objects were specified in detail. Each candidate would be allowed to send free by mail one pamphlet dealing with election issues to each voter in his senatorial or representative constituency.

There seemed to be general agreement that the supervision should be in the hands of a permanent joint committee, not a special committee of Senate or House. Experience with the Reed and Nye committees indicated that a special committee is likely to be biased.

At the Nye committee's hearings interesting suggestions were made. La Follette suggested that the curb be applied by a mere amendment to the Senate rules — barring from that body any Senator on whose behalf more than \$25,000 had been expended. (Of course such a uniform maximum would be distinctly unfair, as between senatorial candidates campaigning, for example, in California and in Nevada.) A representative of the Citizens' Union of New York proposed that as a penalty for violation, the offending candidate be denied the fruits of party victory.

(Nye Committee Report on Senatorial Campaign Expenditures, Dec. 21, 1931, *Cong. Rec.*, 977-84. Report on Expenditures of Anti-Smith Democrats, Dec. 22, 1931, *ibid.*, 1063-69.)

<sup>2</sup> S. Res. 174. By Dickinson, March 1, 1932.

'will take it from Maine to California and from Michigan to Florida,' would indicate that the Senate neither expected nor intended that a thorough investigation should be made. Delays were encountered. It proved difficult to find Republican Senators willing to accept membership on the committee. The majority leader was obviously opposed to the whole enterprise. Only a few days before the end of the session, without a record vote, the resolution, carrying an appropriation of only \$25,000, was adopted.<sup>1</sup>

The activities of this committee proved singularly fruitless.<sup>2</sup> Its entire appropriation was expended upon the investigating of campaign expenditures in a single state, Louisiana. From Broussard, seeking re-election to the Senate, came complaints of irregularities in the pre-primary campaigning then in progress. Some days after the primary had been held, by direction of the chairman the two Democrats on the committee went to New Orleans and conducted hearings, and certain investigators were appointed; later the chairman and another Republican held hearings in New Orleans for a fortnight or more. They had sensational experiences, and disclosed astonishing political practices. But there was no official 'contest' to be investigated, for Broussard, though persistent in complaints, could not claim that he had been either nominated or elected. The committee was to report December 5, 1932, but the chairman secured an extension of time till January 3, 1934. Before that date he had died, a Democratic member had resigned from the Senate, and the committee had been reorganized with Connally as chairman, in consequence of the change of party control in the Senate. Its final report gave rise to long discussion.<sup>3</sup> It set forth the fact that Louisiana has no Corrupt Practices Act for effectively regulating primary elections, with the result that the nomination of candidates in that state is a travesty of the 'people's choice.'<sup>4</sup> Special emphasis was

<sup>1</sup> July 11. The Vice-President named Howell (Chairman), Townsend, and Carey, Republicans; and Bratton and Connally, Democrats.

<sup>2</sup> The committee seems to have given no attention whatever to expenditures in behalf of presidential candidates.

<sup>3</sup> Jan. 16, 1934, *Cong. Rec.*, 698-714. S. Rept. 191. Long made angry reply. *Ibid.*, 1552-67.

The reports of this committee's hearings occupy some 4000 pages.

The Senate was called upon for an additional appropriation, and voted the sum of \$5000, to be drawn upon as needed in meeting its deficit.

<sup>4</sup> The Senate and the public soon had abundant additional information as to that campaign. Upon credentials by the Governor that Overton had been 'duly chosen,' he was sworn in, March 4, 1934. But protests against the validity of his election, submitted by Louisiana individuals and organizations, were referred to the Committee

laid upon the control which faction leaders were able to secure through their manipulation of 'dummy candidates.'

June 15, only three days before the end of the session in 1934, a committee was appointed to investigate senatorial campaign expenditures in the following November elections. The resolution authorizing the appointment of this committee was identical in phrasing with those of two or three previous Congresses, with one significant addition — a provision making it mandatory for the committee to go into a state in which a primary is to be held, before the primary, if a complaint in writing is filed, supported by affidavit or information and belief, by any candidate for the Senate or his responsible manager, twenty days before the date of the primary.<sup>1</sup> In the past the investigation had always been conducted after the primary, and was usually nearly futile, as in the Broussard-Overton contest in Louisiana. The effect of the new provision will be to give the complainant the benefit of the processes of the committee while the primary campaign is in progress.

Chairman Byrnes reported (January 10, 1935) that the committee had conducted investigations in four states, Pennsylvania, Tennessee, Delaware, and New Mexico, and had decided that further inquiry was unnecessary in those states or in any other state. The committee did not recommend any change in the laws relating to the election of Senators.

#### IN PRESIDENTIAL CAMPAIGNS

In recent years the Senate has extended its investigations by its special committees to cover expenditures in primary and election campaigns in behalf not only of candidates for the Senate but of candidates for the Presidency as well. Where is the constitutional

on Privileges and Elections, which conducted a series of public hearings. Much of the testimony was garrulous and incoherent. Overton's account of 'dummy candidates' made clear their presumptive use in corrupting primaries. Upon the chairman's report that only cumulative evidence along the same lines as that adduced by the special committee was forthcoming, and that no further action in the matter or expense in regard to it was warranted, at its own request the committee was discharged, June 16, 1934. *Ibid.*, 12016.

<sup>1</sup> Long insisted upon an amendment to the customary resolution so as to cut out from its field of investigation 'the use of any other means or influence [than money contributions] including the promise or use of patronage, and all other facts in relation thereto which may be of public interest.' He considered such phrases 'mere surplusage,' and said that such vague resolutions had been so glaringly abused that he could not consent to them. Rather than risk defeat of the whole resolution, the mover accepted the amendment. The following Senators were appointed: Byrnes, Costigan, Dieterich, Borah, Keyes.



warrant for a Senate committee's demanding reports of expenditures in a pre-convention campaign to secure for a certain man the nomination for President? The strict constructionist may say: 'There is none.' Others, in Rooseveltian phrase, answer: 'Publicity in this matter is highly essential in the public interest. To provide by Act of Congress or by joint resolution for getting this publicity, as our experience has amply proved, would take too long — if, indeed, it would not be impossible. This information is needed *now*. Therefore it is for a Senate committee to get it.' In 1924 a Senator prominent in the movement for the investigation by Senate committee of expenditures in behalf of presidential candidates, when asked by the writer, 'What would happen if the candidates or their managers should refuse to answer the Senate committee's questions?' replied, 'They will not! Coolidge will make them! His stand in this matter is all right!'

In the spring of 1920 frequent reports in the press indicated that in several states of the Northwest heavy expenditures were being made to 'capture' delegates to the Republican national convention in the interest of two rivals for the nomination. In March Borah introduced a bill 'to provide for publicity of contributions made for the purpose of influencing the election of delegates to national conventions at which candidates for President are to be selected.'<sup>1</sup> After hot debate it was referred to the Committee on Privileges and Elections. Six weeks passed, and nothing was heard from it. Accordingly, May 6, Borah introduced a resolution of similar tenor, which was referred to the same committee; but, a little later, at his request that committee was discharged from its consideration, and it was sent to the Committee to Audit and Control the Contingent Expenses of the Senate.<sup>2</sup> As passed it instructed the Committee on Privileges and Elections, or any subcommittee thereof,

to investigate forthwith and report to the Senate as soon as possible the campaign expenditures of the various presidential candidates in both parties . . . and all other facts in relation thereto that would not only be of public interest but would aid Congress in any necessary remedial legislation.<sup>3</sup>

<sup>1</sup> March 26, 1920, S. 4134. Debated, *Cong. Rec.*, 4853-59. Acknowledging that this method of authorizing the investigation might be slow, Borah declared that he thought the bill could be passed forty days before the conventions.

<sup>2</sup> S. Res. 356. Reported with amendments, *ibid.*, 7327.

<sup>3</sup> The committee was authorized to compel the attendance of witnesses, and the production of papers; its expenses were to be paid from the Senate's contingent fund.

Within the last half-hour of the session of Congress the instructions of the committee were extended to cover investigations and reports as to expenditures of the various candidates in their campaigns for nomination as well as for election.<sup>1</sup> There is little doubt that investigations made under warrant of these two Senate resolutions and the expenditures disclosed by their reports on the eve of the Republican national convention prevented its choice of either of the two men who had been leading in the race for the nomination.<sup>2</sup>

May 26, 1924, Borah offered an amendment (to the bill for the reclassification of postmasters' salaries!) providing for publicity of expenditures in the presidential campaign.<sup>3</sup> The bill was vetoed, and stood little chance of becoming a law. Accordingly, June 5, La Follette offered a resolution providing for the election of a special committee to investigate and report on December 5, 1924, the campaign expenditures in favor of or opposed to candidates for presidential or vice-presidential electors.<sup>4</sup> It was agreed to on the last day of the session, and the Senate at once elected the members whose names were presented by the majority leader.<sup>5</sup> It organized promptly, the reports of its hearings (as required by the resolution which created it) were issued at frequent intervals during the campaign, and its final report, submitted to the Senate February 12, 1925, summarized the committee's findings, and recommended certain changes in the law relating to primaries and elections. The watchful activity of this committee exercised a strong restraining influence upon expenditures and methods in the campaign.

In 1928, Senate action to secure publicity in presidential campaign expenditures was more prompt and more drastic. The resolution, offered on the thirtieth of April by the minority leader, was reported back favorably from the Committee to Audit and Control the Contingent Expenses of the Senate, and agreed to on that same day. It provided for a special committee of five to be appointed by the Presiding Officer of the Senate, and to exercise powers in relation to expenditures in presidential campaigns practically identical with

<sup>1</sup> *Cong. Rec.*, 8641.

<sup>2</sup> The evidence did not necessarily reflect against the character of either; but the amount of money being expended to secure the nomination made a very unfavorable impression. For conditions under which the real selection is said to have been made, see pp. 962-64.

<sup>3</sup> *Cong. Rec.*, 9506-07. It was agreed to by a vote of 55 to 0.

<sup>4</sup> S. Res. 248, *ibid.*, 10961-02; 11139.

<sup>5</sup> Borah, Chairman; Jones (Wash.), Shipstead, Bayard, Caraway.

those of the committee in 1924.<sup>1</sup> But by a later resolution the powers were broadened and more clearly defined to extend to the ascertaining of

all facts as to the receipts and expenditures of the several political committees and of party organizations and agencies and other persons; including the amounts contributed, pledged, loaned or otherwise made available for use, either directly or indirectly, [and instructed the committee to report] such other matter as will aid Congress in its further consideration of necessary remedial legislation.<sup>2</sup>

The obvious intent was to prevent a party committee's running up concealed deficits to be stealthily cleared off after the election.<sup>3</sup> The next day, May 1, the appointments to the committee were made.<sup>4</sup> It continued to hold hearings at frequent intervals till after the election; June 6, before the conventions, it gave out for publication the receipts and expenditures for fifteen presidential candidates, and further summaries were given out on the eve of the election.<sup>5</sup> Its formal reports were submitted to the Senate in January and February of the following year.

In 1936 there was appointed a special committee to investigate 'campaign expenditures of the various presidential, vice-presidential and senatorial candidates' in the coming primaries and elections. The scope of the investigation authorized by the Senate resolution was stated in terms similar to those used in previous years, including, as the majority leader stated it, 'not only all facts in relation to subscriptions of money and the expenditure thereof, but as to the use of any other means or influence, including the promise or use of patronage.'

<sup>1</sup> S. Res. 214, *Cong. Rec.*, 7430.

<sup>2</sup> S. Res. 234; agreed to, May 25.

<sup>3</sup> By methods such as had recently been brought to light as to the Republican National Committee's deficit in the campaign of 1920.

<sup>4</sup> Vice-President Dawes must have found some embarrassment and difficulty in the task assigned to him. He himself was supposed to be an aspirant for the Republican nomination. Some of the Senate's most experienced and skillful 'investigators' were not available, because their terms were ending. A surprisingly large number of hold-over Senators considered themselves highly eligible for the presidential nomination, and hence could not be appointed on this committee. The list, therefore, was made up of new men, only one of whom was completing his first term: Steiwer, Chairman; Dale, McMaster, Republicans; Bratton, Barkley, Democrats.

<sup>5</sup> Among other disclosures early in the campaign for nomination was the serviceableness of the congressional frank. It was testified that Heflin, before May 31, had delivered some forty 'lectures,' as he preferred to call them, in which Smith's candidacy was discussed, and that from local organizations of the Ku Klux Klan he had received \$150 to \$250 apiece for them, while he had franked 550,000 copies of his speeches. A speech of Representative Burton had been franked to 760,000 persons, and one of Representative Brandt to 490,000. The cost to the Government of this franked political propaganda was enormous.



But, significantly, by amendment there was added to that formula, 'or use of any public funds.' April 14, 1936, Vice-President Garner appointed, as members of this committee: Lonergan, Minturn, Schwollenbach, Democrats; Austin, La Follette, Republicans.

In 1938, by Senate resolution there was created a Special Committee to Investigate Senatorial Campaign Expenditures and the Use of Government Funds. The committee promptly declared its intention to take seriously this 'federal funds' part of its assigned task, and issued a questionnaire to be filled out monthly by all of the senatorial candidates, asking whether they had used, or had any knowledge of the use of federal funds to influence nominations or elections. From time to time they issued warnings, and specifically deprecated as 'unfortunate' a speech addressed by the Deputy WPA Administrator to the Workers' Alliance, an organization of WPA workers, in which he was reported to have urged: 'Keep your friends in power. Judge those friends by the crowd they run with, when they come to you to ask for support.' The speaker claimed that he had been inaccurately reported, and that no political implications had been intended.

The committee sent investigators into ten states. Widespread reports were received of pressure being exerted upon those in any way associated with the administration of relief. One of the committee characterized the situation as one in which 'relief of human misery is degraded to gutter politics.' A few days before the holding of the Kentucky primary, the committee issued a formal statement as to the deplorable conditions believed to be state-wide in that community:

It is certain that organized efforts have been and are being made to control the vote of those on relief work, and that contributions have been sought and obtained from federal employees in behalf of one of the senatorial candidates.

It is equally certain that state officials, charged in part with the distribution of federal funds for old-age assistance and for unemployment compensation, have been required to contribute from their salaries and of their services in the interest of another candidate for the United States Senate.

These facts should arouse the conscience of the country. They imperil the right of the people to a free and unpolluted ballot.

President Roosevelt, in person, strongly urged the re-election of the majority leader, Barkley, and in the primary he won the nomination. (At this writing the election of November 8, 1938, is still two months in the future.) The immediate result is far less significant than the vista these conditions suggest, of the 'gutter poli-

tics' almost inevitably to be associated with the administration and distribution of relief, of old-age pensions, and of unemployment compensation in the long years to come.

## INVESTIGATIONS BY THE HOUSE OR BY THE SENATE

---

Until recently little attention has been given to the development of congressional investigations, but since 1925 there have appeared intensive and discriminating studies of the most important phases of this subject.<sup>1</sup>

It has been estimated that from 1789 to 1925 — the end of the Sixty-Eighth Congress — there had been, all told, 'about two hundred and eighty-five investigations by the select and standing committees of the House and Senate. Only three Congresses have been barren of legislative inquests, while no administration has been immune.' The turbulent years of Grant's administrations were most productive of such inquiries, Congress undertaking not less than thirty-seven different investigations aimed at remedying the bad conditions which then prevailed.<sup>2</sup>

In the first forty years after the adoption of the Constitution, the House conducted seven or eight times as many investigations as did the Senate.<sup>3</sup> In fact, down to the last quarter of the nineteenth century most of the investigations of large consequence were instituted by the House.<sup>4</sup> But increasingly, beginning with the last quarter of the nineteenth century, the House has seemed to be relinquishing such activities, while the Senate has been greatly expanding its exercise of the investigative function, in the number, variety, and importance of its inquiries.

<sup>1</sup> See titles (References, p. 567), under the names of M. E. Dimock, E. J. Eberling, G. B. Galloway, J. E. Landis, and C. S. Potts.

<sup>2</sup> G. B. Galloway, 'The Investigating Function of Congress,' *American Political Science Review* (Feb., 1927), 47-48.

<sup>3</sup> Dimock, Marshall E., 'Congressional Investigating Committees,' an excellent doctoral dissertation, Johns Hopkins University, 1928. Doctor Dimock's estimate is that the number of investigations actually concluded by report or resolution, from 1789 to the end of the 69th Congress, exceeds 330.

<sup>4</sup> For example, those relating to General Wilkinson; to Secretary Calhoun; Jackson and the Seminole War; the deposit banks; the patronage under Jackson and Polk; the Covode investigation under Buchanan; and the Alaskan Purchase Scandal.

The explanation of this remarkable shift is to be found in the contrast between the rules and procedure of the House and of the Senate. The most important congressional investigations are launched by critical minorities. But in the House the dominant party has secured such control of the order of business and such limitations on debate both as to time and relevance that there is little hope that the proponents of a resolution for an inquiry can get it effectively before the House, while the report upon the proposal — if one is made — can get only such discussion as may be accorded to it by the chairman of the committee which has had it under consideration, or by the Speaker and the Committee on Rules. In the Senate, on the other hand, any member has ample opportunity to preface his introduction of an investigation resolution by a vigorous presentation of the conditions which demand it. Whether he is of the majority or of the minority, he is practically assured of membership in the special committee or easy access to the standing committee to which it is referred; and a determined though small group can usually force a thoroughgoing debate of the resolution upon the floor of the Senate. The individual Senator's freedom of debate is so much the tradition of the Senate that the majority leaders may find it far wiser to put no obstacle in the way of an investigation resolution which they heartily disapprove, rather than incur the odium of 'trying to suppress the truth.'<sup>1</sup> An excellent illustration is found in 'Jim' Reed's securing from a nominally Republican Senate the creation, under his chairmanship, of the 'Slush Fund Committee' which for four years continued its devastating investigation of expenditures in senatorial election campaigns, especially in the great Republican states of Illinois and Pennsylvania. In the House the 'steam roller' can crush an investigation with dispatch. Thus, in January, 1923, the Chairman of the Judiciary Committee gave notice that he would present from his committee a report that it 'does not appear that there is ground to believe Attorney-General Daugherty guilty of the charges alleged against him.' A member of the committee announced his wish to present a minority report, with the recommendation that the Judiciary Committee be discharged from further consideration of the matter, and that there be appointed a special committee to inquire into the official conduct of Daugherty for the purpose of determining whether impeachment proceedings should be instituted. At the end of brief

<sup>1</sup> 'The Senate appears to have better publicity methods, and for an investigation to thrive publicity is essential.'



debate, the Chairman, without relinquishing the floor, moved the previous question, which was ordered without record vote, and then moved that the resolution be laid upon the table. By a vote of 206 to 78, this was done, no opportunity being given to the minority member to present his substitute amendment.<sup>1</sup> In the Senate a resolute minority of one-third would certainly have obtained a hearing, and probably their recommendation for an investigation would have been granted.

In the Sixty-Sixth Congress (1919-21) there were introduced nearly two hundred and fifty resolutions calling for investigations by standing or special committees, or for authorizations to committees to hold hearings, demand papers and summon witnesses. Fifty-one resolutions for the conduct of investigations were agreed to. From the Senate came three out of four of these investigation resolutions.

For the future, the decision in *McGrain v. Daugherty* has materially broadened the scope of congressional inquiries, and the grand-jury investigative function is likely to be increasingly used by the Senate, particularly as to the Executive and the 'Independent Agencies.'<sup>2</sup>

#### THE COST AND THE VALUE OF SENATE INVESTIGATIONS

The increasing cost of Senate committee investigations in recent years has been startling. February 17, 1926, the Chairman of the Committee on Appropriations presented tabulations showing that, whereas in the entire decade 1910 to 1919 the *total* amount of the regular and special appropriations payable from the Senate contingent fund for investigations had been only \$330,000, that total had been nearly equaled by the appropriations for the single fiscal year of 1925 (\$290,000), while for the seven fiscal years, 1920 to 1926 (the last year's appropriations being then incomplete), such appropriations had aggregated \$1,053,500 — a yearly average of \$153,500.<sup>3</sup> He called

<sup>1</sup> M. E. Dimock, *op. cit.*, 30, n. 32; P. D. Hasbrouck, *Party Government in the House of Representatives*, 113-15; 149; *Cong. Rec.*, 2410-52, Jan. 25, 1923. Lindsay Rogers (*The American Senate*, 252) emphasizes the ease of suppressing embarrassing inquiries in the House, by action of the Committee on Rules and the use of 'previous question.'

<sup>2</sup> Lindsay Rogers, *op. cit.*, ch. VI, 'Congressional Investigations,' and ch. VIII, 'Forum and Critic'; George W. Pepper, *Family Quarrels: 'Over Congressional Investigations'*, 137-88.

A Senate and a House committee may at the same moment be investigating the same subject, and hot on the trail of the same witness (p. 533, n. 2).

<sup>3</sup> Senator F. E. Warren, Feb. 17, 1926, *Cong. Rec.*, 3848-49.

Martin B. Madden, when Chairman of the House Committee on Appropriations, in a discussion of 'The High Cost of Investigating' (*Nation's Business*, July, 1926), cited the fact that in less than ten years, 1913-23, the 'inquiries' on the subject of coal alone by eight different Senate committees had filled 8000 printed pages, and that during six months immediately preceding his writing more than fifty resolutions of inquiry

attention to the fact that on the vouchers of several of these committees individual employees had been drawing salaries at the monthly rate of \$1300, and one committee had allowed much higher rates of compensation than \$1000 a month to several employees. He insisted that 'these large sums ought to go into a resolution, joint or concurrent, so that both Houses might concur concerning the expenditures, rather than be handled as we have been handling them of late — allowing these resolutions almost to "run wild!"' Under his proposal, 'before a given amount authorized has been expended or exceeded, the proponent could come back to the Senate or the House for further authority.'

It cannot be questioned that in recent years the prestige of the Senate has been damaged by the work of some of its investigating committees. Both within and without the Chamber it has been charged that, abandoning the legitimate function of legislative committees, they have gone 'on fishing expeditions' for material for partisan advantage, or even for the paying-off of personal grudges; that their hearings have given wide publicity to scandal and unsifted charges, which partisans and demagogues daily exploited for their own purposes on the floor of the Senate; that the Senate was thus brought

had been offered in the Senate, calling for information from virtually every one of the ten executive departments and from several of the independent branches, in addition to the proposals to conduct investigations through its standing or special committees.

A striking illustration of the high cost of Senate investigations is afforded by the Nye committee's inquiries into senatorial campaign expenditures. After some eight months of its activities, having nearly exhausted its original appropriation of \$100,000, the committee came to the Senate for an extension of the time in which to complete its investigations, and for an additional appropriation of \$50,000. Soon after this request was made, a Southern Senator introduced a resolution that the ballot-boxes used in his state in the recent election be impounded by the Nye committee, which he said could do the work 'much more cheaply' than the Standing Committee on Privileges and Elections, which would inevitably handle the prospective contest. At the request of a member of the latter committee, there was then inserted in the *Congressional Record* the itemized account of the Nye committee's own expenses. It occupied twenty pages, and furnished interesting reading and material for debate. The chairman's brother had received \$4000 and expenses from the committee; the standard rate for its dozen investigators was \$500 a month. Individual drawing-rooms were provided for three members of the committee on a trip from Washington to Raleigh, N.C. Although it was decided that the situation in Massachusetts did not justify the holding of any hearings in that state, the expenses of that investigation were \$2192.50. This included the one-day visit of one member of the committee to Boston, the expenses for which were itemized: 'Travel, hotel, etc., \$77.05; auto hire, \$50.'

Ways may be found to finance the continuance of investigations in which the Senate has lost confidence. (Note Senate debate of Jan. 17, 1936.) Nye acknowledged the expenditure of \$125,000 of Senate funds in twenty months of investigating the munitions industry, the shipbuilding industry, and banking, and disclosed that in addition to this fund authorized by the Senate he had received \$80,000 from the Works Relief Administration, \$23,000 of which was New York City money. Senate leaders severely criticized as unauthorized and improper the Administration's diversion of relief funds to eke out the Senate's appropriation for the work of one of its own committees.

into disrepute through the waste of time and the distraction from normal legislative work; that there has been a great and rapid increase in the cost of 'investigations,' whose utility, the critics allege, has often been in inverse proportion to the expenditure of time and money which they have entailed. Yet much of this criticism has been either undeserved or misdirected. For in not a few instances the discreditable incidents attending Senate investigations have been trifling in comparison with the serious abuses which the committees were seeking to expose.<sup>1</sup>

Within the Senate itself some changes of procedure have been suggested which might lessen the waste of time and of money which many recent investigations have involved. In the first place, a vast deal of time might be saved if Senate investigations were left to their respective committees until their hearings are concluded and the committees' findings formally reported, debate on the floor being meantime confined to the legislative program.<sup>2</sup> This would, of course, require a change in the wording or interpretation of the Senate rules as to debate, so that matter not pertinent to the question could be declared out of order, and a will to enforce such a curb on debate.<sup>3</sup>

Various proposals have been made for trying to secure in advance some determination on the probable utility of making an investigation before a committee is given *carte blanche* to undertake it. Since

<sup>1</sup> In comments on the cost of congressional investigations, too much attention is often given merely to the outlay for carrying on the investigation, with little attention to the material and, it may be, the far more important immaterial gains that result therefrom. Senator Nye was chairman of the committee which investigated the affairs of the Continental Trading Company — an aftermath of the Teapot Dome study. He was associated in this work with Senator T. J. Walsh. The investigation involved the transactions and the shady profits of Sinclair, Blackmer, and O'Neill (p. 529, n. 1). 'As a result of that one investigation the United States Treasury has successfully prosecuted action to cause the payment of taxes evaded by these men and others in the amount of \$7,027,639.09. Further actions within the past year may have materially increased that total. The cost of the investigation was approximately \$30,000. . . . Consider with this the millions of dollars that were recovered by the Government, as well as the vast and valuable resources worth hundreds of millions returned to the Government as a result of the naval oil lease investigations, and there must be agreement that these two investigations have been sufficiently profitable to pay for all the investigations conducted by the Houses of Congress during our lifetime as a nation.' (From reprint of an address by Gerald P. Nye, *Cong. Rec.*, 4182-83, May 25, 1933.) Most salutary and valuable results have come from Senate investigations of the faithlessness of Fall and Daugherty, and of the evil practices of such manipulators as Insull, Harriman, Mitchell, and Wiggin. May 14, 1935, the United States Government received a check for \$5,500,000 from the receiver of E. L. Doheny's Pan-American Oil Company, after release of property liens which had been seized as a result of the Senate investigation of the oil scandals of 1924.

<sup>2</sup> This suggestion was made by Borah, March 23, 1924, while 'oil oratory' in the Senate was at its height.

<sup>3</sup> See discussion of rules governing debate, pp. 422 ff.



resolutions for a committee investigation almost invariably create a charge upon the contingent fund of the Senate, in accordance with Rule 25 such resolutions are at once referred to the Committee to Audit and Control that fund. Following a direction of the Senate,<sup>1</sup> that committee makes no special study as to whether or not the proposed investigation should be made, but simply reports whether the contingent fund can bear the probable expense. Upon a favorable report from that committee, investigation resolutions are usually passed without much demurring, as Senators 'do not care to lay themselves open to the charge of having helped the Administration cover up its defects.'<sup>2</sup> Several Senators who have served for years on the Committee to Audit and Control the Contingent Fund of the Senate have protested against the futility of its consideration upon investigation resolutions, declaring that, if its sole function is to ascertain whether the fund could carry the investigation, a clerk could do that work instead of a committee.<sup>3</sup> Nor has that committee any assured or special competence to pass upon the question as to which of the many proposed investigations on all sorts of subjects are worth the making. Since there is general assent to the proposition that that task should be assigned to *some* committee, Jones (Wash.) suggested:

It seems to me that the wise and proper course with reference to resolutions of this kind would be first to refer them to the committee having jurisdiction over the subject-matter of the resolution, so that that committee may investigate the matter sufficiently to determine whether or not such an investigation should be made; and then, if it reports favorably, the resolution could be referred to the Committee to Audit and Control the Contingent Expense of the Senate to determine the financial aspect of the matter.<sup>4</sup>

Senators of both parties expressed approval of this suggestion, and Curtis, then majority leader, said:

I hope the Senate will adopt the policy of sending all such resolutions first to the committee having jurisdiction over them, so that they may report upon the advisability of making the investigation. It will save time, and I think it will save a good deal of money.<sup>5</sup>

<sup>1</sup> Statement by Jones (Wash.), Jan. 5, 1926, *Cong. Rec.*, 1098.

<sup>2</sup> *Time* (March 1, 1926), 7.

<sup>3</sup> A. A. Jones (N. Mex.) declared: 'That committee or some other committee ought to have jurisdiction to pass upon the merits of these resolutions... and determine whether or no there is enough in it to justify expenditure of the money.' He said that he withdrew from the committee because of its futility in this matter. Fess spoke in the same vein. (*Cong. Rec.*, 1100.) Fletcher suggested that that committee was supposed to ascertain what the cost of the proposed resolution was likely to be, a consideration of some importance.

<sup>4</sup> *Ibid.*, 1098.

<sup>5</sup> *Ibid.*, 1099.

Some weeks later, upon Jones's motion, the Republican conference gave its approval to this proposed change in Senate practice.

There is logic in this proposal, and its adoption should yield some good results. It may, however, not be without significance that both in the Senate and in the Republican conference it was proposed by the Republican whip, and that its most cordial support came from the majority leader and from a conservative Republican Senator who had been the severest critic of the investigations in the previous Congress.<sup>1</sup> The makeup of Senate standing committees usually gives to the party which 'organizes the Senate' a greater representation ratio than it has on the floor of the Senate. More important than the question whether the suggested change would make a desirable saving of time and of money may be the question whether, when the President's party controls the Senate by even the slightest majority, this change might not make well-nigh impossible the launching of any investigation, which, though seriously needed, promised embarrassment to the Administration.

That the scope of a Senate investigating committee's power is difficult to define is evidenced by the long delay of the Supreme Court in announcing its decision in the *M. S. Daugherty* case.<sup>2</sup> In 1924 the disorderly committee hearings and the loose and lurid harangues in the Senate brought its investigations into disrepute. In hearings of the committee ostensibly investigating the official acts of the Attorney-General appeared a miscellaneous assortment of witnesses, many of whom were of most dubious reputation for credibility. Far from conforming to the procedure of a judicial body, 'Prosecutor' Wheeler's instructions to the witness were: 'Say anything you have on your mind!'<sup>3</sup> Referring to the travesty presented by the 'taking of testimony' at those hearings, on the floor of the Senate Fess declared: 'If I were in Mr. Daugherty's place and had witnessed the sort of testimony that was admitted there, I certainly would not appear before this committee, and I would take the position that Mr. Daugherty has taken. I say that as a responsible member of this body.'<sup>4</sup>

<sup>1</sup> That the proposal was not entirely disjoined from the question of party defense is indicated by the following item: 'A group of prominent House Republicans agreed at a conference today to put the legislative brakes on any move to start investigations by House committees. This decision is in line with that reached yesterday by Senate Republicans to check inquiries in that Chamber.' Press dispatch of Feb. 18, 1926 — the day following the adoption of the above resolution by the Republican conference.

<sup>2</sup> In the case of *John J. McGrain v. Mally S. Daugherty*, presented before the Supreme Court, Dec. 5, 1924 (p. 526).

<sup>3</sup> Press report of the hearing of March 18, 1924.

<sup>4</sup> June 5, 1924, *Cong. Rec.*, 10629.

If the jurisdiction of a Senate investigating committee is to be narrowed down to adducing information directly bearing upon the Senate's legislative work, upon the qualifications and elections of members, and grounds for their discipline, and upon impeachment inquiries, then much of the questing in those Daugherty hearings was as far beyond the competence of the committee as it was remote from the rules of evidence in a court of law. But some publicists have maintained that the informing function of Congress should be preferred even to its legislative function,<sup>1</sup> and that 'committees are the agents, the instruments, the channels of communication between Congress and the nation.'<sup>2</sup>

The story is told of two Massachusetts Representatives, in the early days of our Government, who got into a controversy over the House rules. One declared that select committees were 'like senses to the soul'; to which the other sarcastically rejoined, 'What, can we neither see, hear, smell or feel without we employ a committee for the purpose?'<sup>3</sup> The Daugherty committee considered its function mainly that of a 'smelling committee.' Not less important and salutary than affording a basis for possible legislation was its prompt demonstration of how fetid the atmosphere in the Attorney-General's office had become. It is well to remember:

The stench in the nation's nostrils came from the Executive branch. The villainy of the Veterans' Bureau cannot be laid at Congress's door. The disorganization, incompetency and malodor of the Department of Justice were no fault of House or Senate. The leasing of the oil lands had its initiative outside of Congress.... It was the United States Senate, which, against considerable obstacles, persisted in investigations and disclosed rottenness needing disclosure for the preservation of this nation.<sup>4</sup>

During the previous Congress the House committee to which had been referred a resolution for Daugherty's impeachment had shown so little ability or determination to probe the charges to the bottom<sup>5</sup> that in 1924 the feeling in Washington seemed to be that the only control which Congress could exercise over the Executive was through hearings before Senate committees. Professor Lindsay Rogers notes an interesting analogy and contrast:

<sup>1</sup> Woodrow Wilson, cited by Felix Frankfurter, *The New Republic* (May 21, 1924), 329-33.

<sup>2</sup> L. G. McConachie, *Congressional Committees*, 40.

<sup>3</sup> *Ibid.*, 39.

<sup>4</sup> E. E. Whiting, *Boston Herald*, Feb. 24, 1925.

<sup>5</sup> See comments by Wheeler and Fess in Senate debate on the House committee's action on the impeachment resolution.



Such congressional investigations are the only American counterpart for the practice of questions and interpellations in foreign political systems. The congressional check, however, suffers from the fact that it is usually *ex post facto*. The investigations do not take place until maladministration is actually complained of. In parliamentary systems there can be more daily supervision of the executive so that evils are made less probable.<sup>1</sup>

An investigation may serve a useful purpose if it does no more than demonstrate that certain laws are not being administered in accordance with Congress's intent. If Congress enacts a law providing for a flexible tariff, modifications in which may be made by the President upon information furnished by a fact-finding Tariff Commission intended by Congress to be as judicial a body as such a bipartisan body can be, it is a matter of concern, not merely to a Senate committee, but to the public, whether or not a President by various forms of pressure is trying to make that commission the mouthpiece of his own opinion. Congress has the power to abolish the Tariff Commission as it had the power to create it.<sup>2</sup> To constitute an investigating committee to determine for the Senate's information whether the Tariff Commission is being subjected to such executive pressure as to make it no longer serviceable for the purpose for which it was created would seem to be within the Senate's legislative function. It can hardly be seriously held that the framers of the Constitution, who manifested such a dread of the one-man power, intended that congressional supervision should confine itself to the rare and difficult recourse to an impeachment trial in cases when executive practice — even with all honesty of intent — apparently is deliberately thwarting congressional purpose.

It is of the nature of things that in a democratic government — especially in one where a written constitution ordains fixed terms of office for 'independent' executive and legislative departments — there should be some degree of friction between the two. Criticism, though annoying and wasteful of time, energy, and money, may be both normal and salutary. To attempt to curb congressional inquiries by 'advance rigidities' would make effective investigation almost impossible.

<sup>1</sup> *Political Science Quarterly* (1925), 62.

<sup>2</sup> The Federal Trade Commission is also an 'independent agency,' appointed for a six-year term, to exercise quasi-judicial powers of vast importance. It is a matter of significance to the Senate and to the public, when the President requests the resignation and then orders the removal of one of its members, assigning to him only the reason that the work of the Commission would be more effectively carried on 'with personnel of my selection' (pp. 831-33). Controversy over removal of William E. Humphrey.

The sanest correctives of the alleged abuses incident to Senate investigations are to be sought in the cultivation of self-restraint and cool judgment of men and of measures, outside as well as inside of the Senate Chamber.

A good deal must be left to the standards which Congress imposes upon itself and the committees; a good deal must be left to the duty of newspapers to report fairly and not sensationally, and to interpret wisely; a good deal must be left to the good sense of the people.<sup>1</sup>

#### INVESTIGATIONS OR 'PROSECUTIONS'

In 1924, the year of many hectic investigations, there came into use a term little known in earlier investigations — that of 'Prosecutor.' Thus the press frequently referred to Senator Walsh of Montana as 'Chief Prosecutor for the Oil Lease Committee,' and Senator Wheeler became known as the 'Prosecutor' for the committee which investigated the activities of the Attorney-General's office. Although in both cases these investigating committees were constituted with a majority from the party in alleged control of the Senate, each investigation had been instigated by opponents of the Administration, and in each a Democratic Senator from Montana promptly took the lead, quite overshadowing the chairman. It was Walsh who marshaled the evidence against Fall and Chase, Denby and Doheny, and Sinclair and Stewart. Even before the committee had been constituted to investigate Daugherty's official acts, Wheeler announced, 'I intend to ask the privilege of cross-examining him myself.' In his statement of June 4, 1924, Daugherty asserted that, although he had early sought a hearing, during nearly three months the committee had not accorded him that privilege, nor had it called a single witness suggested by him, nor 'assistants or others in active charge of cases and being fully advised with reference to all details and executive work under inquiry.' From the committee's ignoring all these sources of official information, and from its seeking for evidence 'from unexpected sources, and generally from persons so situated that under ordinary circumstances very little credence would be given their testimony,'

<sup>1</sup> Felix Frankfurter, 'Hands off the Investigations,' *New Republic* (May 21, 1924), 329-31. 'If we have a bad Congress, a demagogic Congress or a corrupt Congress, the blame rests squarely on the voters by whose votes its members hold their seats.' E. E. Whiting, *Boston Herald*, Feb. 24, 1925.

For valuable analysis of the uses of the congressional investigation (1) to aid legislation, (2) to supervise the Administration, and (3) to inform the public, and for judicious appraisal of the defects and the merits of such investigations, see George B. Galloway, *op. cit.*, 55-70, and M. E. Dimock, *op. cit.*, ch. VII, 'Criticism and Forecast.'

Daugherty drew the conclusion that 'these members of your committee, instead of prosecuting a fair and impartial inquiry into my official character as Attorney-General of the United States, have made a desperate attempt to blacken my reputation and injure my standing in the community by statements of unreliable witnesses which would not be admitted in any court of justice.'

The extent to which an investigation by a Senate committee may take on the character of a prosecution — not to say a persecution or an assault — received even clearer demonstration during that same session of Congress. In its early weeks an attack by Couzens upon certain features of 'the Mellon Plan,' which proposed a reduction of surtaxes, led to an open-letter newspaper controversy between the Senator and the Secretary of the Treasury in which neither of them added to his own prestige. Soon thereafter Couzens introduced a resolution calling for the appointment of a select committee to investigate the Bureau of Internal Revenue and suggest corrective legislation.<sup>1</sup> Referred to the Committee on Finance, this resolution was reported favorably, and was agreed to by the Senate without dissent. The appointment of this select committee was left to the Chair, who designated Couzens and four members from the Committee on Finance, with Watson as Chairman.<sup>2</sup> In the committee's hearings Couzens took the lead, and by the line of investigations which he selected and by the atmosphere with which he saw fit to surround the inquiry 'made it obvious that his sole purpose was to vent some personal grievance against the Secretary of the Treasury.'<sup>3</sup>

At a meeting of the special committee, April 9, 1924, without previous consultation with his Republican colleagues, but by pre-arrangement with the Democratic members, Couzens proposed a resolution authorizing the employment — at the expense, not of the Senate nor of the committee, but of Couzens — of Francis J. Heney, known throughout the country as a sensational public prosecutor, as special counsel to conduct the inquiry. The Chairman, Watson, repeatedly declared that the result of such action would be 'another Senate muck-raking expedition';<sup>4</sup> but the resolution, modified so as to

<sup>1</sup> S. Res. 168, agreed to March 12, 1924.

<sup>2</sup> Couzens later declared that he 'resented' the placing of 'four busy members of the Finance Committee' upon this committee with him.

<sup>3</sup> This was Mellon's statement, in his letter of April 10, to President Coolidge.

<sup>4</sup> Chairman Watson, before putting the motion, said that he regarded it as 'a little unfortunate' that Couzens's resolution to investigate the Bureau had come on the heels of his public controversy with Secretary Mellon, thus giving the proceedings the appearance of being aimed at Mr. Mellon in reprisal. Ernst, the other Republican on the



keep proceedings within direct control of the committee instead of its 'resigning' in Heney's favor, was adopted by a vote of three to two.

The following day Secretary Mellon in a formal letter called the President's attention to this action, whereby, 'in effect, a private individual — paid by Senator Couzens alone — is authorized to investigate generally an executive department of the Government.' He declared:

The present investigation has greatly injured the efficiency of the income tax organization. . . . Government business cannot continue to be conducted under frequent interference by investigations of Congress, entirely destructive in character. If interposition of private resources be permitted to interfere with the executive administration of government, the machinery of government will cease to function.

He intimated that if such unnecessary interference were to continue, no man of character could longer take responsibility for the Treasury. 'Government by investigation is not government.'

President Coolidge at once sent a special message to the Senate, transmitting therewith a copy of Secretary Mellon's communication, 'because it seems incredible that the Senate of the United States would knowingly approve the past and proposed conduct of one of its committees which this letter reveals.' He declared that there always should exist every possible comity between the executive departments and the Senate.

Whatever may be necessary for the information of the Senate, or any of its committees in order to better enable them to perform their legislative or other constitutional functions, ought always to be furnished willingly and expeditiously by any department. But the attack which is being made on the Treasury Department goes beyond any of these legitimate requirements. . . . The Senate resolution appointing this committee is not drawn in terms which purport to give any authority to the committee to delegate their authority, or to employ agents and attorneys. The appointment of an agent and attorney to act in behalf of the United States, but to be paid by some other source than the public treasury, is in conflict with the spirit of 1764 of the Revised Statutes, the act of March 3, 1917. . . .

It is the duty of the Executive to resist such intrusion and to bring to the attention of the Senate its serious consequences. That I shall do in this instance.

committee, said to Couzens: 'You ought not to go after him just because he spanked you in that correspondence.' Press report of committee hearing, *Washington Post*, April 10, 1924.

In disgust, on the floor of the Senate Watson introduced a resolution that his committee be discharged from further consideration of its task. This resolution led to heated debate, but was indefinitely postponed. *Cong. Rec.* 6186, April 10, 1924.

Under a procedure of this kind the constitutional guarantee against unwarranted search and seizure breaks down; the prohibition against what amounts to a government charge of criminal action without the formal presentment of a grand jury is evaded; the rules of evidence which have been adopted for the protection of the innocent are ignored; the department becomes the victim of vague, unformulated and indefinite charges, and instead of a government of law we have a government of lawlessness. Against the continuation of such a condition I enter my solemn protest, and give notice that in my opinion the departments ought not to be required to participate in it. If it is to continue, if the government is to be thrown into disorder by it, the responsibility of it must rest on those who are undertaking it. It is time that we returned to a government under and in accordance with the usual forms of the law of the land. The state of the Union requires the immediate adoption of such a course.<sup>1</sup>

In the Senate the reading of this message called forth a storm of angry denunciation. One Senator introduced a resolution to expunge the message from the *Journal*, as 'insulting to the Senate.' Others tried to torture the President's words into a condemnation of all the Senate's investigating committees and a refusal for the future to submit to its committees the documents or information necessary for their work. One Senator declared that only by express disavowal of intent to criticize more than the proposed hiring of a 'prosecutor' by that one committee could the President be 'acquitted of sending to the Senate of the United States as arrogant a message, I undertake to say, as since the days of the Tudors and Stuarts was ever sent by the Executive to a parliamentary body of English-speaking people.' The immediate result was the passage of a resolution authorizing the special committee in question to employ special counsel 'and such other agents as the committee deems necessary.'<sup>2</sup> The committee did not choose to bring Heney into the investigation. Both in a minority report and in Senate debate the committee's scathing report was subjected by the Republican members to severe and detailed criticism on the score of inaccuracy and bias.<sup>3</sup>

The response from the country at large left no doubt of the prev-

<sup>1</sup> Message of April 11, 1924. Compare with this message the rebukes to the Senate by Jackson (Message of Feb. 2, 1835) and of Cleveland (Message of March 1, 1886).

In the debate on the nomination of Charles E. Hughes for Chief Justice of the United States, Glass referred to this message, and declared that it was 'practically a brief prepared by Mr. Hughes, who was then Secretary of State, and incorporated bodily as a message of the President of the United States to Congress.' Feb. 11, 1930.

<sup>2</sup> Agreed to, May 6, 1924.

<sup>3</sup> S. Rept. 27, pts. 1, 2, and 3, Jan. 12 and Feb. 6, 1926. See debate, *Cong. Rec.* 3414-21, Feb. 6.

alence of the opinion that several of the investigating committees had 'gone far afield for political issues for campaign material,' and that permitting a millionaire Senator to hire at his own expense a sensational 'prosecutor' to conduct an investigation in a department headed by a man with whom that Senator was in bitter feud was an intolerable breach of political decency.

Despite the storm of denunciation roused in the Senate by the President's assertion that the action of one of its investigating committees had gone far beyond any of the legitimate requirements, not only the press but the Senators upon the floor of the Chamber itself declared that the country was tired of investigations and of a situation 'in which innuendo, suspicion and spite take the place of the measured rules of the law in determining facts.'<sup>1</sup>

But such bias and partisanship were not new. Writing of conditions which prevailed nearly a century earlier, Benton had referred to 'the varieties of abuse' to which Senate investigating committees had shown themselves subject, 'of which, faction, favoritism, personal objects, ungovernable expenses, and little or no utility, constitute the heads.'<sup>2</sup> In the days of Jackson and of Cleveland, of Roosevelt and of Taft, investigations were launched at the activities of the President or of the heads of executive departments. Not without basis of truth is this judgment:

Where the attack of such select committees has been directed against lesser offenders than those of immediate presidential circles, against those whose duties are rather administrative than political, and especially against those who are guilty of financial dishonesty, some good may be said to have been done in the direction of pure and economical government. . . . But the effect of the work of these high political committees (investigating offenders belonging to immediate presidential circles), if any follows, is to be discovered in the returns of national election days.<sup>3</sup>

No one who listened, day after day — as did the writer — to the torrent of invective which Democratic Senators in the spring of 1924 discharged against the Republican Administration could doubt that the approaching presidential election loomed large in many an orator's thought. It may be that by the very extravagance of their

<sup>1</sup> Watson, May 6, 1924.

<sup>2</sup> Benton's special text was a Senate recess committee, authorized June 30, 1834, to inquire whether the Bank of the United States had violated its charter. He characterized it as a 'white-washing' committee, and declared on the floor of the Senate: 'The committee has been treated unworthily, scurvily, basely, by the Bank. It has been made the instrument to report an untruth to the Senate.' *Cong. Globe*, 47, Dec. 18, 1834; *Thirty Years' View*, II, 304.

<sup>3</sup> L. G. McConachie, *Congressional Committees*, 231, 232.



partisan denunciation they overplayed their part and failed to make upon the country as strong an impression as could have been secured had they been content to handle with some restraint such damaging charges as could be proved.

At no other period in its history had the Senate been so engrossed with investigations as during the six-months first session of the Sixty-Eighth Congress (December 3, 1923, to June 7, 1924). In the middle of that session not less than fifty Senators — more than half of the Senate's total membership — were engaged in the work of committees of investigation. Eleven of these committees conducted public hearings, some of which dragged through many weeks. Fourteen Senators were serving on two such committees, and one was a member of three.<sup>1</sup>

Despite the assertion on the floor of the Senate by some influential members that these investigations had 'not retarded for an instant the disposition of any important measure before this body,' other Senators deplored the scant attendance in the Chamber due to the demands of such committee service, and the many hours consumed in furious speechmaking, not upon authoritative committee reports, but upon daily newspaper accounts of loose talk at the hearings.<sup>2</sup> Anxiously awaiting a chance to interrupt the flow of oratory, that he might forward a constitutional amendment which was then the Senate's 'unfinished business,' Wadsworth declared: 'Talk is king here, and those here the least time talk the most!' Again and again work within the Senate Chamber was held up until from the committee rooms where investigations were in progress the Sergeant-at-Arms could corral enough members to complete a quorum. So often was this necessary because of the demands or the attractions of the hearings that Fletcher facetiously suggested that an investigation committee might be put in each corner of the Senate Chamber so that a quorum might thus be assured for the Senate's regular business.<sup>3</sup>

A characteristic investigation is that which was launched against the American Telephone & Telegraph Company. By the Joint Resolution of March 5, 1935, the new Federal Communications Commission was authorized and instructed to investigate that company in most drastic fashion, and \$750,000 was appropriated at the start for

<sup>1</sup> 'And this is the Senate that President Coolidge has "insulted" by asking it to get back to normal governmental processes and procedure!' Editorial, *Washington Post* (April 14, 1924, three days after the President's special message).

<sup>2</sup> Speeches of Lodge, Robinson, Jones, Pittman, and Overman, April 4, 1924.

<sup>3</sup> In December, 1926, it was said that 48 congressional investigations were under way, authorized, or projected. The investigating habit was not new in the Senate. See Edmund Alton's *Among the Lawmakers* (New York, 1886).

7  
not a  
Congress  
investigation

pursuing this inquiry. In the Senate the bill was introduced by Wheeler and in the House simultaneously by Rayburn. In the Senate doubt was expressed as to the need for making the investigation, and as to the enormous appropriation. Wheeler acknowledged that at first he had been 'shocked' at the sponsors' calling for an appropriation of \$1,000,000 — many times the initial sum that had ever been assigned to a previous investigating committee, but he said that he had been informed that an investigation of the telephone situation merely in one state had cost \$1,000,000. He urged the necessity of appropriating the sum named by the committee if the investigation was to be effective. The resolution was passed by the Senate with little debate, and without a record vote. In the House two members of the committee to which it had been referred put in a minority report. While not opposing the adoption of the resolution, they criticized its spirit and language, drafted not in the Senate nor in the House committee, but in the office of the commission which was to make the investigation. (It was practically identical with two resolutions which Dill had introduced in a previous Congress.) Wadsworth, with abundant justification, declared that the resolution, 'if read analytically, is an indictment in advance of investigation.' But the House passed it under suspension of the rules, and without a record vote. In the press it was characterized as the 'most heavily financed "fishing expedition" ever sent out by Congress.' (March 4, 1935.)<sup>1</sup>

<sup>1</sup> Among other investigations in progress by Senate committees at the end of the session in August, 1935, were those concerned with the activities of munitions makers (Nye, Chairman) and with the alleged lobbying of the holding companies (Black, Chairman).

June 17, 1938, the day following the final adjournment of the 75th Congress, Washington dispatches presented a summary showing that thirteen congressional investigating committees, authorized to expend a total of \$820,000, were empowered to function during the coming summer and fall. Some were new inquiries, with initial appropriations; others were continuations of probes authorized in earlier sessions, and in many cases granted large additional funds. Senate committees were to conduct nearly two-thirds of these inquiries. The list was as follows:

*Joint Committees:*

Monopolies and Concentration of Wealth	\$500,000
Administration of the TVA	50,000
Adequacy and Use of the Nation's Phosphate Resources	10,000

*Senate Committees:*

Senatorial Campaign Expenditures and Practices	80,000
Civil Liberties (continued)	60,000
Lobbying (continued)	0
Costs and Prices of Principal Commodities	25,000
Alleged Subversive Activities of Merchant Marine	20,000
Finance Committee: Profit-sharing Plans	30,000
Foreign Relations Committee: Bombing Civilian Populations	0
Irrigation and Reclamation Committee: Water Resources in Arid-Land States	0

*House Committees:*

Un-American Activities: Fascist and Communist	25,000
House Campaign Expenditures and Practices	20,000

## REFERENCES

- Congressional Investigations*. The Code of Laws of the United States, 1926, ch. 6, p. 12.
- Dimock, Marshall E. *Congressional Investigating Committees*. Baltimore, 1929.
- Eberling, Ernest J. *Congressional Investigations*. New York, 1928.
- Flynn, John T. 'Senate Inquisitors and Private Rights,' *Harpers*, Aug., 1930.
- Frankfurter, Felix. 'Hands Off the Investigations,' *The New Republic*, May 21, 1924.
- Galloway, George B. 'The Investigative Function of Congress,' *American Political Science Review*, Feb., 1927.
- Landis, James M. 'Constitutional Limitation on the Congressional Power of Investigation,' *Harvard Law Review*, Dec., 1926.
- Luce, Robert. *Legislative Assemblies*, ch. XXI. Boston, 1924.
- McConachie, Lauros G. *Congressional Committees*. New York, 1898.
- Madden, Martin B. 'The High Cost of Investigating,' *Nation's Business*, July, 1926.
- Nye, Gerald P. 'Legislative Investigations,' *Cong. Rec.*, 4182-83, May 25, 1933.
- Pepper, George W. *Family Quarrels: 'Over Congressional Investigations.'* University of Virginia, William H. White Foundation, New York, 1931.
- Potts, Charles S. 'Power of Legislative Bodies to Punish for Contempt,' *University of Pennsylvania Law Review*, May and June, 1926.
- Rogers, Lindsay. *The American Senate*, ch. 6. New York, 1926.
- Tansill, Charles C. 'The Smith-Vare Case, and Its Relation to Senate Procedure,' *National University Law Review*, May, 1928.
- Walsh, Thomas J. 'Senate as Censor,' *Forum*, Nov., 1926.

*Supreme Court Decisions of Special Significance:*

- 6 Wheaton 204; *Anderson v. Dunn*  
103 U.S. 168; *Kilbourn v. Thompson*  
164 U.S. 436; *Chapman v. U.S.*  
166 U.S. 661; *In re Chapman*  
273 U.S. 135; *McGrain v. Daugherty*



